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No. 3086.

United States 1134
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Edward H. Phelan,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

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BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

(I) CHARACTER OF THE CASE.

Plaintiff in error, Edward H. Phelan, was, on September 7, 1917, indicted in the District Court of the United States in and for the Southern District of California, southern division, for wilfully failing and refusing to present himself for and submit to registration under the act of Congress, approved May 18, 1917, and entitled "An act to authorize

the President to increase temporarily the military establishment of the United States.” Said indictment charging that on June 5, 1917, which was the registration day appointed by Presidential proclamation under said act, said plaintiff in error was a male person who then had attained his twenty-first birthday, and who did not on that day attain and had not before that day attained his thirty-first birthday. The indictment further charged that plaintiff in error was not on June 5, 1917, an officer, or an enlisted man of the regular army, of the navy, of the marine corps, or of the national guard, or naval militia in the service of the United States, or an officer in the reserve corps, or an enlisted man in the enlisted reserve corps in active service. [Tr. page 6].

There were two trials of the case. On the first trial the jury was unable to agree, having stood according to common report 6 to 6, and the second trial was commenced October 17, 1917, before the Hon. Oscar A. Trippet, district judge and a jury. On this second trial, plaintiff in error was on October 19, 1917, found “guilty as charged in the indictment.” [See Tr. p. 19]. Thereafter and before sentence plaintiff in error moved for a new trial [Tr. p. 146], which motion was by said court denied, plaintiff in error thereupon duly excepting [Tr. p. 29], and thereupon the court pronounced judgment sentencing plaintiff in error to imprisonment for a term of twelve months in the county jail of Los Angeles county, California, and that he thereupon be registered according to the provisions of said act of Con-

gress [Tr. p. 30]. All of the evidence introduced in the trial is embodied in a bill of exceptions appearing in the transcript [Tr. p. 31], and the case is now in this United States Circuit Court of Appeals on writ of error.

(2) THE FACTS.

It is the contention of the government that plaintiff in error Edward H. Phelan was born July 13, 1886. If such was, in fact the case, and plaintiff in error, Phelan, believed on June 5, 1917, that he was born on July 13, 1886, and wilfully failed and refused to register, then his conviction was obviously justified, but the plaintiff in error testified that he was born on March 13, 1886, and that so honestly believing and understanding on registration day, June 5, 1917, he did not register and that had he believed he was not 31 years of age he certainly would have registered. [Tr. p. 77.] If Phelan was born on March 13, 1886, he had attained the age of thirty-one years, two months, and twenty-three days on registration day. If he had been born on July 13, 1886, he would have lacked being thirty-one years on registration day by thirty-eight days.

(a) *Government's Opening Statement to Jury.*

In his opening statement to the jury, Mr. Gordon Lawson, deputy United States attorney, made the following promises and representations, to-wit: [Tr. p. 32 *et seq.*].

Your Honor and Gentlemen of the Jury: The Government expects that the evidence in this case will show (segregation and numbering being ours).

(1) That the defendant was born July 13, 1886; that would bring him within the requirements of the selective service act; and that on June 5, 1917, the defendant should have registered the same as the rest of the men who were required by that act to register.

We expect that the evidence will show

(2) that in 1886, before July 13, that those people who were in a position to know, acted upon the belief—and they had good grounds for believing—that the defendant was not in existence.

And we expect that the evidence in this case will show

(3) that the defendant knew that he was born July 13, 1886, and that through *all* the course of his life he acted on that belief.

We expect that the evidence will show

(4) that his mother and that his father, and that his brothers and sisters, and his friends who knew him, all believed and acted upon the belief that he was born July 13, 1886, and

(5) that in all the various experiences of this defendant's life, wherever the question of his age came up, it was always July 13, 1886, until June 5, 1917, and then for the first time were his friends aware, or did he ever announce to anybody that he was born March 13, 1886.

(6) That this defendant deliberately planned and contrived by holding himself out at this time as having been born on March 13, 1886, to avoid the service as required by the selective service act.

And, gentlemen of the jury, the United States, the ten million young men who registered on June 5, would expect you to find this gentleman guilty and require of him the same service as the rest of the men who were required to register on June 5th.

(b) *Witnesses for the Government.*

The only witnesses introduced by the Government were the following: George T. Jeffries [Tr. p. 34]; Wm. L. Price [Tr. p. 35]; Father Patrick Harnett [Tr. p. 35]; Mrs. Mary Isbell [Tr. p. 40]; Miss Rexie Dale [Tr. p. 44]; Haribet J. Rechsteiner [Tr. p. 44]; Mrs. Susie Daven [Tr. p. 44]; and Frank Daven [Tr. p. 60].

Mr. George K. Jeffries [Tr. p. 34] testified that he was a deputy county recorder at Los Angeles and that he had with him a book containing the declarations of homesteads for the year 1886, and that there was therein recorded a declaration of homestead signed by one Thomas Phelan on June 4, 1886. It was stipulated that Thomas Phelan was the father of plaintiff in error and that he was dead.

William L. Price [Tr. p. 35] testified that he was a deputy county clerk of Los Angeles county and that he had in his custody the will of Thomas Phelan which he had obtained from the files and records of the Superior Court and which will had been filed January 9, 1890.

The Reverend Patrick Harnett [Tr. p. 35] testified that he was a priest of the Roman Catholic Church

and as such had custody of the baptismal records, and that a priest who officiates at a baptism is supposed to record it, and who against the objections and exception of plaintiff in error was permitted to testify [Tr. p. 36] that the priest officiating at a baptism is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child, *the date of the birth of the child*, and the names of the sponsors.

Monsignor Harnett also testified that he had the baptismal record for the year 1886 with him and that there was recorded therein the baptismal record of plaintiff in error, and that he had baptized the child, and Monsignor Harnett was permitted by the court in answer to a question put to him by the court itself, and against the objections and exception [Tr. p. 37] of plaintiff in error to testify that he had baptized the child on the eighth of August, 1886. Also Monsignor Harnett, against the objections of plaintiff in error and his exception was permitted to testify as to what was the teaching of the Catholic Church in regard to infants dying before baptism, to the effect that the teaching of the Catholic Church with regard to the salvation of infants who die without baptism is that no child who is unbaptized and dies before it obtains the use of reason can enter into the Kingdom of Heaven, and also notwithstanding the objections of the plaintiff in error and his exception Monsignor was permitted to answer this question.

“Q. Was there a practice in your church that was known to those parents concerning when the child should be baptized?”

To which question the monsignor replied as follows:
“A. I don’t know.” [Tr. p. 39.]

The monsignor further testified that he did not remember the incident of the baptism at all and that the parents of the child lived about fifteen miles from the parish school.

Mrs. Mary Isbell [Tr. p. 40] testified that she knew the plaintiff in error and that she did not know exactly how many years she had been at Whittier, but that she had been a neighbor of the Phelan family ever since she had been there, probably forty years. That she had a daughter who was born July 11, she thought as well as she could remember, but she did not remember the year in which she was born; that she did not remember that Mrs. Phelan had been confined at about the same time that she was confined with her daughter Rexi Dale, and she could not say for certain whether Mrs. Phelan had visited her about the time of the birth of her daughter. She could not say so because she really did not remember. She could not say whether plaintiff in error was born after the time that she had been confined with her daughter Rexi Dale [Tr. p. 42]. She repeated that she declared she couldn’t say because she didn’t know whether Mrs. Phelan was confined with plaintiff in error at the same time when she was confined with her daughter Rexi Dale, and when again asked for the fourth time what her memory was of that occurrence against the objection of plaintiff in error, on the ground, among others, that she had already testified that she did not know [Tr. p. 43] she made answer as follows:

“Q. By Mr. Lawson: Well, according to your best recollection, Mrs. Isbell?” [Tr. p. 42.]

She replied by saying:

“A. Well, really, I couldn’t tell you. Of course, I do not know anything about when he (referring to plaintiff in error) was born.”

When practically the same question was again put, she again stated as follows: [Tr. p. 43.]

“Well, I declare I could not say because I don’t know.”

Then in answer to the following question, to-wit:

“Q. Well, what is your memory of that occurrence?”

And again the objections and exception of plaintiff in error, upon the ground among others that she had already testified she did not know, she answered as follows:

“A. Well, I thought mine was the oldest. Of course, I couldn’t say positively.”

And again, “I don’t know anything about how much, or anything about it, and I may be wrong in that.”

On cross-examination, Mrs. Isbell testified that she was seventy years old and had had eight children and that she did not remember the year in which her daughter Rexi was born, and that she could not remember the year in which any of her children were born, and that owing to her age, she certainly had a very poor memory, and that it was difficult for her to

remember with any degree of certainty anything that occurred years ago.

Miss Rexi Dale [Tr. p. 44] testified that Mrs. Mary Isbell was her mother and that she did not know the age of the plaintiff in error and against the objections of plaintiff in error and his exception, Miss Dale was permitted to testify that she was born July 11, 1886.

Haribet J. Rechsteiner [Tr. p. 44] testified that he was financial secretary of Los Angeles Council, No. 621, Knights of Columbus; that the original application of the plaintiff in error for membership in the Knights of Columbus had been filed with the court records at the last trial; that he had received it from the supreme secretary; that he had attended the first trial and heard a part of the plaintiff in error's testimony in regard to the signing of the application, that he heard the middle of it, and that the plaintiff in error had admitted signing the application. The application referred to had been previously admitted in evidence as United States Exhibit No. 1 against the objections of plaintiff in error that no sufficient foundation had been shown therefor and his exception, and appeared to be the application of Edward Henry Phelan for membership in Los Angeles Council, Knights of Columbus, and was dated June 14, 1909, and in said application, said Phelan declared that he was born on the 13th day of July, 1886, and that he was then twenty-three years of age as computed from his nearest birthday.

Mrs. Susie Daven [Tr. p. 48] testified that she and her husband, Fred Daven, had been living on a ranch at Whittier belonging to Mrs. Phelan, mother of plaintiff in error from July 17, 1916, until May 14, 1917, on which date she left the ranch; that she knew plaintiff in error and that her husband during that period had worked for Mrs. Phelan. Against the objections of plaintiff in error and his exception to the ruling, the court permitted [Tr. p. 49] the witness to state that plaintiff in error had prior to May 14, 1917, and on May 6, 1917, stated that he would not register because he was not going to be killed for any other nation and he would disguise himself and go out into the mountains either of Arizona or Nevada.

It is to be borne in mind that the act authorizing the President to increase the military establishment of the United States had not been enacted until May 18, 1917, and that the President's proclamation providing for registration was not published until May 18, 1917.

The witness did not again see Edward Phelan, plaintiff in error, after leaving the ranch on May 14, 1917 [Tr. p. 51] and she was positive that Phelan made the statement about not registering on the first Sunday in May, 1917, which was May 6, 1917 [Tr. p. 52.] After May 6, 1917, she did not again hear Phelan talk [Tr. pp. 52-53.] That Phelan had made those remarks two or three times before; that her husband and her children heard Phelan make the remarks referred to, and that these remarks were made in the kitchen of the house on the Phelan ranch occupied by witness's family, and that the remarks were made by Phelan in the afternoon of May 6, 1917, between one and two

o'clock [Tr. p. 55.] She made no memorandum of what Phelan said.

Frank Daven [Tr. p. 60] testified that he was acquainted with plaintiff in error and worked on the same ranch with him and that he had a conversation with Phelan in regard to military service on the first Sunday in May, 1917, at home of witness on the Phelan ranch [Tr. p. 60], and against the objections of plaintiff in error and his exception to the court's ruling witness was permitted to testify as follows: "Mr. Phelan says—he says he never got to register; he don't want to get killed going to fight for France and England" [Tr. p. 61]. "He said he don't want to get killed for France and England and then go to war. He let his whiskers grow and get away in the mountains up in Nevada some place and the *board could not find him*" (p. 62.)

It is to be here observed that the "board" undoubtedly referred to was the exemption board, but which could not have been known to either Phelan or Daven or Mrs. Daven until after the enactment of the law on May 18, 1917, and the Presidential proclamation.

Daven also stated that "sometimes we talk about the war every day, because I am French and Phelan take the German side and I pay no attention after that." On cross-examination Daven testified that he was positive that the conversation testified to took place on the first Sunday in May, which was May 6, 1917; that his wife moved away from the Phelan ranch on a Sunday in May and that the said conversation he had with Edward Phelan took place on a Sunday morning about

half-past nine, or something like that. [Tr. p. 67.] Phelan did not live on the ranch where he worked, but was in the habit of visiting the place on Sundays. Upon objection by the Government and an exception reserved to plaintiff in error, the court would not permit the witness to answer the following question put to him by plaintiff in error, to-wit:

“Q. Did he (that is Phelan) ever do anything to you to make you feel unkindly toward him?”

Davin also testified as follows:

“Since April 1st, 1917, I had a controversy with Mr. Peterson in reference to the war. Mr. Peterson during all the time that I was working on the Phelan ranch, worked there, and Edward Phelan, as foreman, myself, Mr. Gunar Peterson and De La Real did all the work. Since the war broke out in 1914 there has been a great deal of talk on one side or the other with reference to the war. I was born in France, and naturally I am a Frenchman. I think Peterson was born in Sweden; so far as I understood he was born in Sweden. Since the war broke out I was not strong for anybody, but I am just like everybody; my sympathies were with France. Peterson, the Swede, was somewhat favorable to Germany, and between us two there was a great deal of conversation pro and con about the war.”

(c) *Witnesses for Plaintiff in Error.*

On behalf of plaintiff in error the following testimony was adduced:

Edward Henry Phelan [Tr. p. 76] testified in his own behalf, stating that he resided at Whittier all of

his life and that he was born March 13th, 1886, and that he did not register on June 5, 1917, because he was past the registration age and that he honestly believed and understood that he was 31 years and past on registration day, and that had he believed that he was not 31 years of age, he certainly would have registered, and that he had no objections to the war either conscientious or otherwise [Tr. p. 77.] That up until four years ago his impression was that he was born on July 13th, 1886, and that four years ago that impression was corrected and during that four years he always believed that his birthday was March 13th, and that he got that information from his mother. He denied that on the first Sunday of May, 1917, or at any other time, he had, as testified by Susie Daven and Frank Daven, said that he would not register because he was not going to be killed for any other nation and would disguise himself and go up into the mountains, or used language of similar kind or import at any time whatsoever. That on June 5, 1917, he took Mr. Peterson, one of the employees on the ranch, to register; that he never advised any human being not to register.

The court would not permit plaintiff in error to offer evidence tending to show that the relations between him and the Davens were unfriendly to which ruling of the court plaintiff in error excepted [Tr. p. 81.] On cross-examination plaintiff in error testified that he was under the impression that he was born July 13, 1886, up until the year 1913; that he was living with his mother during that time and that whenever he had occasion to state his birthday prior to

1913 he would give it as July 13, and that he was 27 years old when he changed his mind. On redirect examination, it was attempted to be shown that a brother of plaintiff in error, named Joseph John, regarded and observed July 22 as his birthday when, as a matter of fact, years after, it was discovered that June 22 was his birthday, but the court would not permit the witness to be interrogated on this subject, to which ruling plaintiff in error excepted.

Mrs. Mary Phelan [Tr. p. 84] testified that she was the mother of plaintiff in error, sixty-eight years old, and had continuously resided at Whittier since 1863, that she was a widow, and that plaintiff in error, Edward Henry, was born March 13, 1886, and that there were present at the time of the birth a midwife by the name of Guara, and a woman by the name of Mrs. Martinez; that the midwife was dead and that Mrs. Martinez was in the court room; that she had had eight children and that she remembered the circumstances when Edward was born on March 13, 1886. On cross-examination she testified that she had always been under that impression, and always would be, and she never said anything differently and that she had always held him out as having been born March 13, 1886, and that she had no occasion to tell his birthday until four years ago when her son came there, wanted his birthday and that she never told anybody what his birthday was before that time.

A typewritten document was then shown the witness which had been filed in the Superior Court at Los Angeles county on February 10, 1892, which was

a petition to set apart a homestead, which had been signed by the witness, Mary Phelan, and which set out in *haec verba* a declaration of homestead that had been signed by Thomas Phelan alone, the husband of the witness, on June 4, 1886, in which declaration said Thomas Phelan stated that his family consisted of a wife and five children. Mary Phelan testified that she had six living children on June 4, 1886. An examination of the typewritten petition discloses that it states that at the time of the death of the husband he left him surviving, among other, plaintiff in error, "Edward F. Phelan, then aged about two years," when, as a matter of fact in any event said son's name was Edward Henry Phelan and he was then aged *about three years* instead of *about two years*. This petition signed and verified by Mary Phelan discloses how easily mistakes will be made in the preparation of documents.

The witness further testified that she was drawing a pension from the Government, that she had made several applications for the pension, but did not remember how many, that she tried it a long time and then stopped two or three years, and that she could not get it, and then a man back in Washington wrote to her. She did not remember when she finally got it. "Could not say whether it was eight years ago or not." Did not remember when she made the first application. While being examined in connection with her pension the witness, Mary Phelan, was shown in succession the two documents which are United States Exhibits No. 3 and 4, respectively, and which purported to be photostat copies of depositions made by

Mary Phelan in connection with her pension applications. The deposition in Exhibit No. 3 purports to have been made November 1, 1909, in which was set forth that she had six children living when her husband died, and that she had lost one before her husband died, and that the names and dates of birth were as follows:

“Eddie Henry, born July 13, 1886.” [Tr. p. 100.]

In said Exhibit No. 4 was purported application for pension of one Mary Phelan, dated October 12, 1889, in which was set forth among the names and dates of birth of children the following:

“Eddie Phelan, of soldier, by applicant, born July 13, 1886.” [Tr. p. 105.]

Also in Exhibit No. 4 was another application of Mary Phelan, dated August 15, 1890, reciting among the names and dates of birth of all the children the following:

“Eddie, born July 13, 1886.”

Also application of Mary Phelan, dated May 12, 1908, in which appears the following after the statement of the names and dates of birth of all the children of the soldier now living and under sixteen years of age at date of soldier's death: “Edward H. Phelan, born July 13th, 1886, at Whittier.” In said Exhibit No. 4 there was also a purported affidavit of Mary Phelan setting forth the date of the births of the children of said witness, and among them the following: “Edward H., July 13th, 1886, sworn to Oct. 31st, 1892.”

Against the objections of plaintiff in error upon the grounds of incompetency, irrelevency and immateriality, and that no proper foundation had been laid therefor, each of said exhibits 3 and 4 were admitted in evidence by the court to which rulings plaintiff in error duly excepted.

The Exhibits 3 and 4 were merely photostat copies of another original document, which was not produced at the trial [Tr. p. 102, 112]; consequently none of these documents contained any original signature. It was not proven that the witness, Mary Phelan, had signed any of the originals of which Exhibits 3 and 4 purported to be photostat copies. Witness Mary Phelan was not asked if she had made any of aforesaid statements as to the age of Edward H. Phelan in any of said documents.

When Exhibit No. 3 was shown to the witness she was asked by the Government counsel the obviously impossible question: "Isn't that your signature?" [Tr. p. 95], because there was no signature anywhere on the document except the signature of the commissioner of pensions who made the certification. The witness answered the question by saying, "it looks like it, but I couldn't say whether it is or not."

And as to Exhibit 4, the Government counsel put this question: "Is that or is not your signature" [Tr. p. 97], and the witness answered as follows: "It looks like mine, but I couldn't say, I don't know whether it is or not."

After Exhibits 3 and 4 had actually been admitted in evidence and read to the jury and passed over to the jury for examination, the Government put upon

the witness stand Claya Taylor, who testified that she was a clerk to the United States attorney and that she partially had custody of the filing of papers, etc., and that she sent telegrams. [Tr. p. 15.] She identified the Government's Exhibit No. 5 as a carbon copy of a telegram sent from the office of the United States attorney. Plaintiff in error objected upon the usual grounds and that no foundation was laid therefor. Thereupon, against the objections and exception of plaintiff in error, the court admitted in evidence, Exhibit No. 5, which was a carbon copy of a purported telegram and which read as follows:

"Attorney General, Washington, D. C. Send to special examiner Uline Los Angeles original papers proving age and birth of Edward Phelan in pension application by Mary Phelan include any other evidence in pension files. Papers identified telegram Oct. 9 from Saltzgaber trial Oct. 16. Rush O'Connor U. S. Atty."

Thereupon against the objections of plaintiff in error and exception reserved, the witness identified a letter which is Government Exhibit No. 6 as having been received in the office of the United States attorney, and thereupon also against the objections of plaintiff in error and his exception this particular letter was introduced in evidence. It read as follows: [Tr. p. 118.]

"Department of Justice: RLD—LP.

Bureau of Investigation.

Washington, Oct. 10, 1917.

John R. O'Connor, Esq., Asst. U. S. Attorney, Los Angeles, Cal.

Dear Sir: Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on Nov. 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made Oct. 12, 1889, Aug. 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of Aug. 24, 1912, 37 statutes at large, page 498, section 3.

The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. BIELASKI,

Chief."

Obviously the subsequent introduction in evidence of the carbon copy of a telegram, Exhibit No. 5, and the letter from A. B. Bielaski of the Department of Justice, Exhibit No. 6, could not justify the introduction in evidence of the alleged photostat copies constituting Exhibits 3 and 4. Exhibits 3 and 4 were not accompanied by any certificate of the commissioner of pensions to the effect that it was impracticable to

send the original papers. The only statement as to impracticability of sending the original papers was that of Mr. Bielaski, who was not connected in any manner whatsoever with the commissioner of pensions, or with the Pension Office and had nothing whatever to do with the keeping of the Pension Office records. His statement to the effect that the commissioner of pensions considered it impracticable to send the original papers is pure hearsay. This feature was called to the court's attention, but fruitlessly. [Tr. p. 119.]

Mrs. Maria Jesus de Martinez testified that she has been acquainted with the defendant Edward Phelan ever since he was born, that she knew his mother Mary Phelan since they were young girls. That she was present at the birth of Edward Phelan, that aside from a midwife who was dead over 20 years, there was no one present at defendant's birth except herself and Mrs. Phelan; that she did not remember the month that Edward was born, but that her son Gasper was born nearest Edward and that Gasper was going on 33 years of age, having been born on January 6; that Gasper was a year and a month or two older than Edward.

On cross-examination she stated that she had four children, but that she did not remember the years of the birthdays. She did not remember the year Gasper was born in, but she stated that he was going to be 33 years next January. She had it on a memorandum. The father used to mark it down as the children were born. That she had a family record of the births of her children.

The following old-time residents of the community in Los Angeles county, California, in which Edward Henry Phelan, plaintiff in error, has spent his whole life, testified that they were acquainted with the reputation of said Phelan in such community for truth and veracity and peace and quiet, and that the same was good, several of the witnesses adding that it was very good, or one saying it was most excellent, to-wit:

H. E. Collins [Tr. p. 122], horticulturist and manufacturer of fertilizers, resident of Los Angeles county for 28 years, who had known Phelan for possibly 18 years;

T. L. Gooch [Tr. p. 122], horticulturist, resident of Los Angeles county for 47 years, who had known Phelan all his life;

Max Schwed [Tr. p. 123], retired, resident of Los Angeles county for 48 years, who had known Phelan since childhood;

Mrs. Harriett W. R. Strong [Tr. p. 124], resident of Los Angeles county since 1888, who had known Phelan for 29 years;

A. H. Gregg [Tr. p. 124], rancher and land business, resident of Los Angeles county for 36 years, who had known Phelan since he was a little child;

George F. Prince [Tr. p. 125], vegetable buyer for California Vegetable Union, resident of Los Angeles county for 30 years, who had known Phelan for 7 or 8 years;

C. Sorensen [Tr. p. 125], resident of Los Angeles county for 51 years, who had known Phelan since his childhood, and

O. N. Souden [Tr. p. —], banker, resident of Los Angeles county for nearly 18 years and who had known Phelan for nearly 17 years.

(d) *Comment on Representation of Government Counsel as to the Proof He Would Make on Opening Statement.*

It must, therefore, be evident that the district attorney signally failed to submit to the jury the legal proof of the five propositions that he laid down in his opening statement and which propositions, to repeat, were as follows: [Tr. p. 32 *et seq.*]

(1) That the defendant was born July 13, 1886; that would bring him within the requirements of the selective service act; and that on June 5, 1917, the defendant should have registered the same as the rest of the men who were required by that act to register;

(2) That in 1886, before July 13, that those people who were in a position to know, acted upon the belief—and they had good grounds for believing—that the defendant was not in existence;

(3) That the defendant knew that he was born July 13, 1886, and that through *all* the course of his life he acted on that belief;

(4) That his mother and that his father, and that his brothers and sisters, and his friends who knew him, all believed and acted upon the belief that he was born July 13, 1886;

(5) That in all the various experiences of this defendant's life, wherever the question of his age came up, it was always July 13, 1886, until June 5, 1917, and then for the first time were his friends aware, or did he ever announce to anybody that he was born March 13, 1886; and

(6) That this defendant deliberately planned and contrived by holding himself out at this time as having been born on March 13, 1886, to avoid the service as required by the selective service act.

SPECIFICATION OF THE ERRORS RELIED UPON.

The plaintiff in error hereby specifies the following errors which he relies upon and intends to urge in this brief, to-wit:

I.

The court erred in allowing Father Patrick Harnett to answer the following question propounded by the Government on its behalf over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted:

“Q. What are the facts that the priest is required to record?” [Tr. bottom of p. 35 *et seq.*]

Mr. Dockweiler: I want to object to the question upon the ground that it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Read the statements. (Last statement read by the reporter as follows):

‘He is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child.’

The Witness (continuing): The date of birth, *the date of birth of the child*, and the names of the sponsors.”

The baptismal record of the date of birth is hearsay.

II.

The court erred in allowing Father Harnett to answer the following question propounded by the court itself over and against the objections of plaintiff in error, and in refusing to sustain such objections and to which action of the court the plaintiff in error duly excepted, to-wit:

“Q. By the Court: Now, what date was the child baptized? [Tr. bottom of p. 37].

Mr. Dockweiler: Now, just one minute. Now, pardon me, Your Honor, I want to get in an objection. We object to that question upon the ground that the same is incompeent, irrelevant and immaterial, as the defendant contends, it is wholly immaterial to the issues in this case as to when the child was baptized in the Roman Catholic Church.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Answer the question, Father Harnett.

A. I baptized the child on the 8th of August, 1886.”

The date of baptism was immaterial, because it cast no legitimate legal light as to the date of birth of Phelan, and no question was involved of proving Phelan’s existence in August, 1886.

III.

The court erred in allowing Father Harnett to answer the following question propounded by the court itself over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

“By the Court: Where? (That is with reference to the place of baptism.) [Tr. p. 38.]

Mr. Dockweiler: The same objection. The same ruling, I assume?

The Witness: I am not quite certain as to where the child was baptized, but I assume it was baptized in Los Nietos.

The Court: Anything further of this witness?”

IV.

The court erred in allowing Father Patrick Harnett to answer the following question propounded by the Government over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

“Q. By Mr. Lawson: What is the teaching, Father Harnett, in the Catholic Church in regard to infants dying before baptism? [Tr. p. 38.]

Mr. Dockweiler: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

A. The teaching of the Catholic Church with regard to the death, or with regard to the salvation of

infants who die without baptism, is that no one, no child who is unbaptized and dies before it attains the use of reason can enter into the Kingdom of Heaven."

The teaching of the Catholic Church as to infants dying before baptism was wholly immaterial, and under the circumstances, could shed no legitimate legal light as to date of Phelan's birth.

V.

The court erred in allowing Father Patrick Harnett to answer the following question propounded by the Government over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

"Q. Was there a practice in your church that was known to those parents concerning when the child should be baptized? [Tr. p. 39.]

Mr. Dockweiler: Now we object to that question upon the ground that it is incompetent, irrelevant and immaterial and upon the ground that it assumes that the Monsignor knew what was in the minds of the parents of the child.

The Court: I will overrule the objection.

Mr. Dockweiler: Exception. I ask the question to be repeated.

The Court: Read it to him.

(Last question read by the reporter.)

A. I don't know."

The jury, or some of them, however, may have improperly drawn an inference that the parents of Phelan

did know what Catholics believed and that they believed that a child should be baptized as soon after birth as possible, and that the probability was that Phelan was born in July instead of March.

VI.

The court erred in admitting in evidence United States Exhibit No. 3, during the cross-examination of witness Mary Phelan, over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

Said United States Exhibit No. 3 was a document consisting of seven pages, purporting to be photostat copy of a deposition made by Mary Phelan, November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan. [Tr. p. 102 and four preceding pages.] There was attached to said document the certificate of G. M. Saltzgaber, Commissioner of Pensions, dated October 10, 1917, certifying that said seven pages were true photostat copies of such deposition. Therefore, said document was not in any sense an original document and contained no original handwriting, or original signature, except the signature of said G. M. Saltzgaber. Said document contained among other things the following statement [Tr. p. 100]:

“My husband, Thomas Phelan, and I lived together as husband and wife until he died. We were not separated nor divorced. I have not married since my husband, Thomas Phelan, died. We had six children living when my husband died and we had lost one

before my husband died. The names and dates of birth are as follows:

* * * * *

Eddie Henry, born July 13th, 1886."

Said Exhibit No. 3 was admitted in evidence while the government was cross-examining witness Mary Phelan, presumably for purposes of impeachment, without proper identification thereof and without any proof whatever that the witness Mary Phelan had signed the original document of which said Exhibit No. 3 purported to be a photostat copy, and no foundation whatever was laid for the introduction of any photostat copy in place of the original. It was not properly shown that the original document, assuming that the same was in existence, could not have been produced, or that it was lost. The letter of A. Bielaski, Chief of the Bureau of Investigation, Department of Justice, who was not in any way whatsoever connected with the Department of Pensions or with the Commissioner of Pensions, or with the custody of the original deposition, if the same was in existence, could not justify the introduction in evidence of said Exhibit No. 3. The statement with reference thereto in said Bielaski letter that "the Commissioner of Pensions considered it impracticable to send the original papers," was pure hearsay.

Before said Exhibit No. 3 was admitted in evidence witness Mary Phelan was asked by Government counsel this question and replied as follows [Tr. p. 95]:

"Q. Isn't that your signature (exhibiting document to witness that is the purported photostat copy, Exhibit No. 3, which contained no original signature)?

A. It looks like it, but I couldn't say whether it is nor not.

* * * * *

Mr. Palmer (interposing): Let the reporter identify it as the one you just asked her about.

The Court: What exhibit is it? Let the clerk identify it. [Tr. p. 96.]

Mr. Lawson: Exhibit No. 3, Your Honor, for identification.

* * * * *

Mr. Lawson: Your Honor, may we now offer these two exhibits, marked 'Exhibits 3 and 4 for identification' as evidence? [Tr. p. 97.]

Mr. Dockweiler: Let us take one at a time.

The Court: Take No. 3.

* * * * *

Mr. Dockweiler: Take No. 3, yes. The document that is marked Exhibit No. 3 is dated October 10, 1917. That is the certificate thereto. We object to it upon the ground that the same is incompetent, irrelevant and immaterial and that no proper foundation has been laid therefor.

The Court: Just pass it up and let me see it. Mr. Lawson, will you kindly step up here, please? (Mr. Lawson thereupon steps to the bench.)

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception."

Thereupon Mr. Lawson read Exhibit No. 3 to the jury.

VII.

The court erred in admitting in evidence United States Exhibit No. 4, during the cross-examination of Mary Phelan, over and against the objections of plaintiff in error and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

Said United States Exhibit No. 4 was a document consisting of eight pages, purporting to be photostat copies of three applications for pension made October 12, 1888; October 15, 1890; May 12, 1908, respectively, and an affidavit by Joaquin Bot and Mary Phelan on October 31, 1892, and filed by Mary Phelan, as widow of Thomas Phelan, in the Bureau of Pensions. [Tr. p. 112 and eight preceding pages.]

There was attached to said document certificate of G. M. Saltzgaber, Commissioner of Pensions, dated October 10, 1917, certifying that said eight pages were true photostat copies of said three applications for pension and affidavit. Therefore, said document was not in any sense an original document and contained no original handwriting, or original signatures, except the signature of said G. M. Saltzgaber. Said document contained among other things the following statements:

“That the following are the names and dates of birth of all his legitimate children yet surviving who were under 16 years of age at father’s death (that is, Thomas Phelan, husband of Mary Phelan), viz.:

* * * * *

8. Eddie Phelan of soldier, by applicant, born July 13, 1886.” [Tr. p. 105.]

Also

“That names and dates of birth of all the children now living under 16 years of age of the soldier (that is, of Thomas Phelan, husband of Mary Phelan) are as follows:

Eddie, born July 13, 1886.” [Tr. p. 107.]

Also

“That the names and dates of birth of all the children of soldier (that is, of Thomas Phelan, husband of Mary Phelan) now living and under 16 years of age at the date of soldier’s death are as follows:

* * * * *

Edward H. Phelan, born July 13, 1886, at Whittier.” [Tr. p. 110.]

Also

“That the date of the births of the children of said soldier is as follows:

* * * * *

Edward H., July 13th, 1886.” [Tr. p. 112.]

Said Exhibit No. 4 was admitted in evidence while the Government was cross-examining witness Mary Phelan, presumably for purposes of impeachment, without proper identification thereof and without any proof whatever that the witness Mary Phelan had signed any of the original documents of which said Exhibit No. 4 purported to be photostat copies, and no sufficient foundation whatever was laid for the introduction of any photostat copies in place of the originals. It was not properly shown that the original documents, assuming that the same were in existence, could not have been produced, or that they were lost. The letter of

A. Bielaski, Chief of the Bureau of Investigation, Department of Justice, who was not in any way whatsoever connected with the Department of Pensions, or with the Commissioner of Pensions, or with the custody of the original applications and affidavit, if the same were in existence, could not justify the introduction in evidence of said Exhibit 4. The statement with reference thereto in said Bielaski's letter, "the Commissioner of Pensions considered it impracticable to send the original papers," was pure hearsay.

Before said Exhibit 4 was admitted in evidence witness Mary Phelan was asked by the court and Government counsel these questions and replied as follows [Tr. p. 97]:

"The Court: That is not the question. Do you think it is your signature or do you think it is not your signature?"

Mr. Dockweiler: This is no original document.

Q. By Mr. Lawson: Is that or is it not your signature?

A. It looks like mine, but I couldn't say. I don't know whether it is or not.

Mr. Lawson: I submit this also for identification.

The Court: It will be No. 4 for identification. (The document so offered and identified was thereupon marked 'United States Exhibit No. 4.')

Mr. Lawson: Your Honor, may we now offer these two exhibits marked 'Exhibits 3 and 4 for identification' as evidence?

Mr. Dockweiler: Let us take one at a time. [Tr. p. 97.]

* * * * *

Mr. Lawson: Your Honor, I submit these other applications as evidence, as Exhibit Number 4. [Tr. p. 102.]

The Court: Exhibit 4.

Mr. Dockweiler: We object to the introduction of Exhibit Number 4 on the ground that the same is incompetent, irrelevant and immaterial, no sufficient foundation having been laid therefor. Of course, it is stipulated that these documents, upon their face, do not appear to be original documents, but appear to be what are known as photostats, whatever that may be.

Mr. Lawson: The certificate on the outside clearly indicates the character of the copy. It is a photostat copy of the written record. [Tr. p. 103.]

The Court: That raises a new question to me. I do not know anything about it.

* * * * *

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception."

Mr. Lawson thereupon read U. S. Exhibit No. 4 to the jury.

VIII.

The court erred in overruling the objections of the plaintiff in error to certain questions propounded by Government counsel to the witness Mary Phelan while she was being examined as to entries of the birth of her children in U. S. Exhibit No. 4, and to which ruling plaintiff in error duly excepted, as follows, to-wit [Tr. p. 113]:

"Q. By Mr. Lawson: I also want to call your attention, Mrs. Phelan, in Government's Exhibit No.

4, the first page the entries of the births of your children, if that is in your own handwriting?

A. I don't know.

Q. Is or is that not, your handwriting?

A. I don't know; I couldn't say; I don't remember writing that.

Q. Does it appear to be your handwriting?

A. No.

* * * * *

[Tr. p. 114]:

The Court: I think, Mr. Lawson, you will have to show me some authorities on the subject. You can ask her if she made certain statements in that document.

Q. By Mr. Lawson: I ask you again, Mrs. Phelan, if that is in your handwriting?

A. I don't remember; I can't say.

* * * * *

The Court: Well, you may ask her if it is a photographic copy of her handwriting.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember—

Mr. Dockweiler: Now, Mrs. Phelan, one minute, we object to the question as incompetent, irrelevant and immaterial, and not cross-examination and assumes a fact not proven.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

Q. By Mr. Lawson: Is that your handwriting?

A. I don't remember; I don't remember if I wrote it.

The Court: That was not the question I gave you leave to ask.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember.

Mr. Dockweiler: One minute now, I renew my objections.

The Court: Well, the objection will be overruled to that.

Mr. Dockweiler: Exception."

IX.

Grave error was committed in the trial of the case, highly prejudicial to plaintiff in error [see affidavit of R. T. Walters, Tr. p. 148], when Mr. Gordon Lawson, Assistant United States Attorney, in making the closing argument to the jury on behalf of the Government, among other things argued and stated to the jury, against the objections of counsel for plaintiff in error, and in the first instance, without any remonstrance or correction whatever by the court, and, in the second instance, without any remonstrance by the court of the conduct of counsel for the Government, and without any adequate correction, made the following statement to the jury, to-wit:

"Then Mr. Dockweiler said: 'Let us go bravely through the evidence.' And I want to say, Mr. Dockweiler, that you surely have valor; and I pay him tribute for the braveness with which he went to the evidence and it did require a courageous man, gentlemen of the jury, to go through all of that evidence. And he did the best he could; he did as well as any-

body could do, and he is a valorous man. He said certain witnesses testified to nothing. Of course, why? Of course, *because he would not let them. That is why they did not testify. Why the suppression of the facts, gentlemen of the jury? Why didn't they want these facts to get to you? And then he goes up and says they testified to nothing.* It is only because of the power of counsel—

Mr. Dockweiler: May it please the court, I now assign as error the remarks just made by the prosecuting counsel in commenting upon my effort representing the defendant in this case to keep out evidence that the court held was improper and thereby appealing to the prejudice and other instincts of the jury.

Mr. Lawson: That remark—

Mr. Dockweiler: I assign it as error.

The Court: Proceed with the argument.

Mr. Lawson: That remark was referred to by Mr. Dockweiler. You said they didn't testify. And again, I repeat, the reason they didn't testify was because Mr. Dockweiler would not let them testify. *Evidently you can draw from that only one conclusion* that those facts were to be withheld from you—

Mr. Dockweiler: If the court please, I want to assign the remarks just made by counsel since my first objection as error, and I urge and assign them as error.

The Court: The jury will not consider the remarks of the United States Attorney coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded." [Tr. p. 128.]

As appears from the above citation of the record, the court, on the strenuous objection of counsel for plaintiff in error, took no action and made no comment in the first instance except to tell Mr. Lawson to "proceed with the argument," thereby approving Mr. Lawson's unjust, unfair, and unwarrantable criticism; and in the second instance, it will also appear that the court did not reprove or remonstrate with Government counsel, Mr. Lawson, nor did the court tell the jury that they must not be prejudiced in any way against plaintiff in error, because of his objections to any evidence, or because of the exclusion of any evidence by reason of the making of such objections. The court should also at that very time have warned the jury that it was the duty of counsel for plaintiff in error to object to any offered evidence which in his opinion would not be legal evidence in the case. On several occasions counsel for plaintiff in error caused the exclusion of testimony. [Tr. pp. 34, 35, 44, 115.]

X.

The court erred in allowing Miss Rexi Dale to answer the following question propounded by the Government and over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court defendant duly excepted, to-wit [Tr. p. 44]:

Miss Dale had just testified that Mrs. Isbell was her mother and that she did not know the age of plaintiff in error, Edward Henry Phelan.

“Q. And when were you born, Miss Dale?

Mr. Dockweiler: We object to that as irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dockweiler: Exception.

A. I was born July 11, 1886.”

XI.

The court erred in refusing to permit Government witness Frank Daven to answer the following question propounded to him by plaintiff in error on cross-examination upon the objections of the Government, to which action of the court plaintiff in error duly excepted, to-wit:

Said Frank Daven was a witness for the Government and had testified that Phelan, plaintiff in error, had stated that he had had a conversation with Phelan in regard to military service the first Sunday in May (May 6, 1917) at his home on the Phelan ranch in the presence of his wife and daughter and that

“Mr. Phelan says, he says he never got to register; he don’t want to get killed going to fight for France and England—he says he don’t want to get killed for France and England and then go to war. He let his whiskers grow and get away up in mountains up in Nevada some place, and the Board couldn’t find him. [Tr. pp. 61 and 62.]

Q. Did he (referring to Edward Phelan) ever do anything to you to make you feel unkindly to him? [Tr. p. 67.]

Mr. Palmer (of counsel for the Government): We object to that if the court please, as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: Exception."

XII.

The court erred in refusing to allow Edward Henry Phelan, plaintiff in error, upon the objections of counsel for the Government, to testify and give evidence tending to show that the relations between him and the witness, Mrs. Daven, were unfriendly, to which action of the court plaintiff in error duly excepted, to-wit [Tr. p. 81]:

On the direct examination of Phelan, plaintiff in error, the following questions were put to him by his counsel, Mr. Dockweiler, and the following objections were made by Mr. Palmer, counsel for the Government, and the rulings of the court were as hereinafter set forth:

"Q. By Mr. Dockweiler [Tr. p. 80]: Mr. Phelan, with reference to the Davens, what, if anything, occurred near or about the first of May in connection with Mrs. Daven and your relationship with Mrs. Daven in reference thereto?

A. Why, when Mrs. Daven—

Mr. Palmer: If the court please, we object to that question as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: I desire, Your Honor—exception to the ruling—I desire, Your Honor, now at this time to show by this witness—

Mr. Palmer: We object if the court please, to counsel stating in the presence of the jury a matter that he proposes to prove, that the court has ruled to be incompetent.

Mr. Dockweiler: Well, how may I—

The Court: I suppose, Mr. Dockweiler, that your idea is to offer evidence tending to show the relations, whether friendly or otherwise, between this defendant and the other people?

Mr. Dockweiler: Yes, Your Honor.

The Court: The evidence is immaterial. In a collateral matter of that kind, you are bound by the answer of the witness, as I understand the law—and if you want to state—if you want to make a record of it, you may write out what you desire to say and file it with the reporter, and consider it as being your offer on that question.”

XIII.

The court erred in refusing to allow Edward Henry Phelan, plaintiff in error, upon the objections of the counsel for the Government, to answer the following question put to him by his counsel for the purpose of showing that for years a brother of Mr. Phelan's had been mistakenly observing his birthday in a month other than the one in which he was born, to-wit [Tr. p. 83]:

“Q. Mr. Phelan, was there any other instance in your family of a brother for years observing a birthday in one month erroneously?

Mr. Lawson: Your Honor, objected to as incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Mr. Dockweiler: Exception. I desire to prove by this witness—

Mr. Lawson: Now, Your Honor, object to what counsel expects to prove when the objection has been sustained.

The Court: Well, I will withdraw the ruling and let him state it.

Mr. Dockweiler: I offer to show by this witness, Your Honor, that the brother of this witness, John Joseph Phelan, five years regarded and observed July 22 as his birthday, when, as a matter of fact, years after it was discovered or ascertained that June 22 was his birthday.

Mr. Lawson: Your Honor, that witness is in court and can be produced; it is the best evidence.

The Court: Well, the objection will be sustained now.

Mr. Dockweiler: That is all. Exception."

XIV.

The court erred in refusing to allow Mary Phelan, the mother of plaintiff in error, upon the objections of counsel for the Government, to testify regarding her other son, John Joseph Phelan, mistakenly observing a date in a wrong month as his birthday, as follows, to-wit [Tr. p. 85]:

"Q. Do you know whether John Joseph Phelan had for any period of time regarded July 22 as his birthday—

Mr. Lawson: Just a minute.

Mr. Dockweiler (continuing): —instead of his real birthday, June 22?

Mr. Lawson: Your Honor, I object to that as incompetent, irrelevant and immaterial.

Mr. Palmer: Leading and suggestive.

Mr. Lawson: And leading and suggestive, and calling for a conclusion of the witness.

The Court: Wait a minute. The objection will be sustained.

Mr. Dockweiler: Exception.

Q. Do you know whether your son, John Joseph Phelan, for any period of time had mistakenly regarded a certain day as his birthday?

Mr. Lawson: Just a minute now; don't answer that. Objected to on the same ground, Your Honor.

Mr. Dockweiler: Exception. Cross-examine.

XV.

The court erred in admitting in evidence U. S. Exhibit No. 5, during the examination of Government witness, Claya Taylor, over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit: Said U. S. Exhibit No. 5 purported to be a carbon copy of a telegram purporting to have been sent to the Attorney General at Washington by O'Connor, United States Attorney, and reading as follows, o-wit:

“Western Union Telegram
Charge Government Rating
Los Angeles, Cal. 10-9-17

Attorney General

Washington, D. C.

Send to special examiner Uline Los Angeles original papers proving age and birth Edward Phelan in pension application for Mary Phelan include any other evidence in pension files papers identified October ninth from Satzgaber trial October sixteenth Rush O'Connor U. S. Atty.”

Plaintiff in error objected to introduction in evidence of Government Exhibit No. 5 on the ground that the same was incompetent, irrelevant and no foundation had been laid therefor, which objection was overruled by the court and to which ruling of the court plaintiff in error duly excepted.

There was no justification for the admission in evidence of said carbon copy of purported telegram and its admission in evidence was prejudicial to plaintiff in error. The telegram requested the Attorney General to send to Los Angeles “*original papers proving age and birth Edward Phelan in pension application for Mary Phelan.*” This statement, coupled with the introduction in evidence of Government Exhibits No. 3 and No. 4, respectively, undoubtedly impressed upon the jury the fact that the exhibits themselves, 3 and 4, proved the birthday of Edward Phelan to have been July 13, 1886.

XVI.

The court erred in allowing Claya Taylor, a witness for the Government, to answer the following questions proposed to her by Government counsel against the objections and exception of plaintiff in error, to-wit [Tr. bottom of p. 115]:

“Q. Can you identify that telegram (referring to U. S. Exhibit No. 5), Miss Taylor, as having been sent from the office of the U. S. Atty.?

A. It is a carbon of the telegram.

Mr. Dockweiler: One minute, what is that question? (Last question read by the reporter.)

Mr. Dockweiler: We object to that question upon the ground that it is incompetent and irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Dockweiler: No foundation laid for it. Exception.

Q. By Mr. Lawson: Just answer the question.

A. I recognize it as a carbon copy of a telegram sent from the office.”

Thereupon Government counsel offered said carbon copy of telegram as U. S. Exhibit No. 5 and thereupon the following objections and ruling were made and action taken, to-wit:

“Mr. Dockweiler: Objected to on the ground that it is incompetent, irrelevant and immaterial, and no foundation therefor.

The Court: The objection will be overruled.

Mr. Dockweiler: No sufficient foundation therefor has been laid, and not the best evidence.

The Court: Overruled.

Mr. Dockweiler: Exception."

Thereupon said carbon copy of telegram was admitted in evidence as U. S. Exhibit No. 5.

XVII.

The court erred in admitting in evidence U. S. Exhibit No. 6 during the examination of Claya Taylor, witness for the Government, over and against the objections of plaintiff in error, and refusing to sustain such objections, to which action of the court the plaintiff in error duly excepted, to-wit: Said U. S. Exhibit No. 6 purported to be a letter addressed to John R. O'Connor, Assistant United States Attorney, by A. B. Bielaski, Chief of Bureau of Investigation in the Department of Justice, and which letter was in the words and figures following, to-wit:

"Department of Justice, R. L. D. L. P.

Bureau of Investigation

Washington, October 10, 1917.

John R. O'Connor, Esquire,

Assistant United States Attorney,

Los Angeles, California.

Dear Sir:

Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made

October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. BIELASKI, *Chief.*”

Presumably the above letter was admitted in evidence as an answer to the carbon copy of telegram which was U. S. Exhibit No. 5, and particularly because said letter contained the following statement, to-wit: “The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.” As to what the Commissioner of Pensions *considered* is purely hearsay and a conclusion.

Counsel for plaintiff in error particularly requested the court, even after the Bielaski letter had been introduced and read in evidence, to personally read the letter [Tr. top of p. 119], but the court still insisted that its ruling should stand, admitting the letter in evidence. The court at the time making this observation:

“Of course, the court must take judicial notice that Bielaski is the Chief of the Pension Department, and his superior, of course, is the Commissioner of Pensions. Bielaski is the man who should have charge of these things and send them out, but he should do it only with permission of his chief or senior officer. Let the ruling stand.

Mr. Dockweiler: Exception.”

We do not understand how the court could conclude that Bielaski was Chief of the Pension Department or that his superior was the Commissioner of Pensions, or that Bielaski was the man who should have charge of the applications for pensions made by Mary Phelan, copies of which were introduced in evidence as U. S. Exhibits No. 3 and No. 4, respectively, or for that matter, any other pension papers. The court's conclusion in this respect was entirely wrong. A. B. Bielaski was on October 10, and still is, Chief of the Bureau of Investigation in the Department of Justice, as is indicated by the letter itself, and then again O'Connor did not telegraph to the Pension Bureau; he telegraphed to the Attorney General for Mary Phelan's pension applications. The Government is challenged to show by any record or publication of any kind whatsoever that A. B. Bielaski was in any manner connected with the Pension Department, or had custody of any pension papers whatever, or particularly had the custody of original papers of which U. S. Exhibits No. 3 and No. 4 purport to be photostat copies.

XVIII.

The court erred in admitting in evidence U. S. Exhibit No. 1 during the examination of Haribet J. Rechsteiner, the witness for the Government, over and against the objections of the plaintiff in error, and in refusing to sustain such objections, to which action of the court the plaintiff in error duly excepted, to-wit: Said U. S. Exhibit No. 1 was a document purporting to be an application of the plaintiff in error for membership in the Knights of Columbus, which application

was dated June 14, 1909, and in which application there was a statement that the applicant was born on the 13th day of July, 1886. The witness Rechsteiner was shown the application admitted in evidence as U. S. Exhibit No. 1 and identified it as having been received by him from the Supreme Secretary of the Knights of Columbus, the witness Rechsteiner being financial secretary of the Los Angeles Council 621 of said Knights of Columbus.

Thereupon the following proceedings took place [Tr. p. 45]:

“Mr. Lawson: Your Honor, I offer this application of the plaintiff in error as evidence.

Mr. Dockweiler: We object to it, Your Honor, upon the ground that it is incompetent, irrelevant and immaterial, no sufficient foundation having been shown therefor.

The Court: I do not know as I understand this.

Mr. Palmer: It is the application of the plaintiff in error for admission as a member of the order of Knights of Columbus.

Mr. Lawson: The Knights of Columbus, and he there states or sets out his birthday and signs the application. The signature is attached thereto.

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception.

Mr. Lawson: We submit this as Government Exhibit No. 1.

(The document so offered and identified was thereupon marked ‘U. S. Exhibit Number 1.’)

Mr. Lawson: (Reading the document to the jury.)”

XIX.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the plaintiff in error Edward H. Phelan from the mere fact that he was baptized on the 8th day of August, 1886." [Tr. p. 129.]

To which refusal of the court the plaintiff in error duly excepted.

XX.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"You are instructed that on June 4th, 1886, and at the time Thomas Phelan executed the declaration of homestead on the property near Whittier, where he was then residing, the law of the state of California did not require that he insert in such declaration of homestead the names of his children, the number of his children, or the ages of his children."

To which refusal of the court the plaintiff in error duly excepted.

XXI.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"You are instructed that the law of the state of California has at no time required one declaring a homestead on property to insert in the declaration of homestead the names, ages or number of his children, or the dates of their birth."

To which refusal of the court the plaintiff in error duly excepted.

XXII.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

“The court instructs the jury that the law did not require a declaration of homestead to set forth the number of children, or their ages, possessed by the party making such declaration of homestead.”

To which refusal of the court the plaintiff in error duly excepted.

XXIII.

The court erred in refusing to instruct the jury as requested by plaintiff in error, as follows, to-wit:

“You are instructed to return a verdict acquitting the plaintiff in error.”

To which refusal of the court the plaintiff in error duly excepted. No evidence whatever was adduced to prove a charge in the indictment, to-wit:

“He the said Edward H. Phelan, then and there not being an officer or an enlisted man of the regular army, or the navy, or the Marine Corps, or of the National Guard, or of the Naval Militia in the service of the United States, or an officer in the Reserve Corps or an enlisted man in the Enlisted Reserve Corps in active service.” [Tr. top of p. 7.]

XXIV.

The court erred in overruling and denying plaintiff in error's motion for a new trial, to which action of

the court plaintiff in error then and there duly accepted. [Tr. pp. 146 and 151.]

XXV.

The court erred in making, giving and rendering judgment against the plaintiff in error on the indictment herein for the reason that the verdict of the jury is against the law, in that the evidence failed to show that the plaintiff in error was guilty of the crime charged in the indictment, or any crime whatsoever.

XXVI.

The court erred in making, giving and rendering judgment against the plaintiff in error on the indictment herein, for the reason that the evidence conclusively shows that the plaintiff in error was over thirty-one years of age on June 5th, 1917, and also in that it was not proven on the trial of said action that the plaintiff in error was not then and there an officer or an enlisted man in the regular army, or the navy, or the Marine Corps, or the National Guard, or the Naval Militia in the service of the United States, or an officer in the Reserve Corps, or an enlisted man in the Enlisted Reserve Corps in act of service.

BRIEF OF THE ARGUMENT.

I.

With Reference to Aforesaid Specifications of Error Numbered Respectively I, II, III, IV and V, Occurring in Testimony of Government Witness, Father Patrick Harnett, We Respectfully Submit That in Each of the Errors Hereinbefore Specified the Action of the Court in Overruling the Objections of Plaintiff in Error Was Highly Prejudicial.

Under the decisions said Harnett, who baptized Phelan, having no personal knowledge regarding the date of his birth, could not testify as to date of birth, neither could that part of the baptismal record reciting the date of birth be introduced because the record is as to such date of birth merely hearsay.

Berry v. Hull, 6 N. M. 643, 30 Pac. 936;
Durfee v. Abbott, 61 Mich. 471, 28 N. S. 521;
Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541;
1 Greenleaf on Evidence, paragraph 493;
Chambers v. Chambers, 32 N. Y. Supp. 875;
Clark v. Trinity Church, 5 Watts 266;
Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207;
Kabok v. Phoenix Mutual Life Ins. Co., 51 Hun. 639, 4 N. Y. Supp. 718.

The Government, having called Father Harnett to produce the book of baptisms for the year 1886, and having proven that he had baptized Phelan, and having shown that the baptismal record contained not only

the date of baptism, *but a statement as to the date of birth of the child*, it was undoubtedly impressed upon the jury that the date of birth so recorded was some date other than March 13th, 1886, as contended for by plaintiff in error, and that counsel for plaintiff in error were fearful of allowing such record to be read in evidence.

Then again, it was immaterial to the issue in this case when Phelan was baptized. It was conceded by the Government that Phelan was already in existence on August 8, 1886, the date of baptism, because the Government contended that he had been born July 13th, 1886, but the Government counsel, knowing a Michael Duffy was a member of the jury [Tr. p. 11], and, we presume, assuming that the name Duffy, being of Irish origin, was likely to be borne by a man who was a Catholic and that probably other members of the jury were Catholic, that the proof of the date of baptism by the baptizing priest himself would result in the jury more readily coming to the conclusion that the date of birth of July 13th, contended for by the Government, was more probably the date of birth than March 13th, because being nearest to the date of baptism on August 8th.

Baptismal Certificate.

A statement as to a child's age in the certificate or register of his baptism is alone no proof of the date of his birth.

Houlton v. Manteuffel, 53 N. W. 541.

Baptismal registers or certificates are admissible to show the fact and date of baptism, but not to prove other facts, for example, the date of the birth of a child, except that he was born before the baptism.

Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521;

Berry v. Hull, 6 New Mexico 643, 30 Pac. 936;

Kabok v. Phoenix Mutual Life Insurance Co., 4 N. Y. Supp. 718;

Jacoby v. Germania Order, 26 N. Y. 318;

Herman v. Mason, 37 Wis. 273.

It must be remarked here that notwithstanding the fact that the age of the defendant was the issue involved here, this does *not* make the question, as far as evidence is concerned, *one of pedigree*, so as to bring the case within the rule allowing in certain instances hearsay testimony of matters of pedigree.

A statement as to a child's age in the certificate or register of his baptism is, alone, no proof of the date of his birth.

Houlton v. Manteuffel *et al.* (Minn. Oct. 29, 1892), 53 N. W. Rep. 541.

Assuming that the certificate of defendant's baptism, "issued by his church," would have been admissible as an official entry or registry to prove the fact and date of his baptism, it was not competent to prove his age or the date of his birth. An official entry or registry must speak only to that which it was the duty or business of the official to do, and not of extraneous facts which did not occur in his presence; consequently, the

mention of a child's age in the registry of christenings is alone no proof of the date of his birth.

- 1 Greenleaf on Evidence, Para. 493;
- Burghart v. Angerstein, 6 Car. & P. 690;
- Rex v. Clapham, 4 Car. & P. 29;
- Wiher v. Law, 3 Starkie 63.

The certificate was properly excluded.

Unless acknowledged as documents of an authentic and public nature, by the laws of the state where kept, church registers are not admissible in evidence, except by special statute.

Childress v. Cutter, 16 Mo. 24.

An entry in a parish register of a child's baptism is not evidence of the identity of such child, nor is the recital in such entry of the child's age sufficient evidence thereof to support a plea of infancy.

Morrissey v. Wiggins Ferry Co., 47 Mo. 521;

The certificate of a priest who baptized a person is incompetent to prove the age of such person.

Berry v. Hull, 6 N. M. 643, 30 Pac. 936.

A record of baptism, containing a statement of the time of the birth of the person referred to in it, but none of the day on which the baptism itself took place, can only be relied on as evidence of the date of the baptism, and not of the date of the birth.

Kabok v. Phoenix Mutl. Life Ins. Co., 51 Hun. 639, 4 N. Y. Supp. 718.

A church register is not admissible as evidence of the facts therein recited, as it is not a book required to be kept by law.

Chambers v. Chambers (Sup.), 32 N. Y. Supp. 875, 24 Civ. Proc. R. 187.

A church record of births, deaths, and burials is not competent to prove births.

Sitler v. Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

A record of baptism, when admissible in evidence, is evidence of the date of baptism, but not of birth, though stated therein.

Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521.

A record of a baptism made by a minister of a parish is admissible evidence of the fact of baptism.

Huntly v. Compstock, 2 Root 99.

Where the entry of a baptism in a church register states the date of the birth of the baptized person, it is not evidence of such date to prove infancy, where that is an issue.

Herman v. Mason, 37 Wis. 273.

Pedigree.

Not involved. Although the age of a female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proven by the written declaration of a third person.

Evidence in case of pedigree. In cases of pedigree it must be shown that the person who made the entry is dead before the evidence will be admissible.

People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256.

“Although the term ‘pedigree’ includes the facts of birth, marriage, and death, and the times when these events happened (Greenleaf on Evidence, Sec. 104), and evidence of these facts is pertinent for the purpose of establishing pedigree, the several facts, or either of them, do not of themselves constitute pedigree, and a case in which the age of an individual is the issue to be determined is not a case of pedigree. ‘A case is not necessarily a case of pedigree because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental and the judgment will simply establish a debt or a person’s liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth, are incidentally inquired of.’ (Eisenlord v. Clum, 126 N. Y. 566. See, also, Haines v. Guthrie, L. R. 13 Q. B. Div. 818.) In Leggett v. Boyd, *supra*, the defense of infancy was made to an action upon a promissory note, and in support of this defense the family Bible of the parents was offered in which the entry of his birth had been made by his mother; and its exclusion was upheld upon the ground that the person by whom it was made was in court and could have been examined. Campbell v. Wilson, *supra*, was of the same character, and the evidence was excluded because

it was shown that the mother was within reach of the process of the court. *Greenleaf v. Dubuque etc. R. R. Co.*, *supra*, was an action to recover damages for negligence in causing the death of a person, and, for the purpose of establishing his age as an element in determining the amount of damages, the plaintiff was allowed to show the date of his birth from an entry in the family Bible. This was held to be error, on the ground that it was not shown that the person who made the entry was dead. In *Robinson v. Blakely*, 4 Rich. 586, 55 Am. Dec. 703, the family register of births and deaths was held inadmissible to show the age of the plaintiff for the purpose of determining whether the action was barred by the statute of limitations, upon the ground that the father who made the entry was still alive, the court saying: 'These entries stand on no higher footing than other declarations, and are entitled to no higher consideration, except that if made at the time the fact occurred they are more reliable.' The admissibility in evidence of these facts is limited by *Mr. Greenleaf* in the action above referred to, to cases where they arise incidentally and in relation to pedigree as follows: 'Thus an entry by a deceased parent, or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact or date of the birth, marriage, or death of a child or other relative, is regarded as the declaration of such parent or relative in a matter of pedigree.' *Taylor* says (*Taylor on Evidence*, 650): 'Entries made by a parent or relation in Bibles, prayer-books, missals, almanacs, or, indeed, in any other book,

or in any document or paper, stating of a child or other relation, are also evidence in pedigree cases as being written declarations of the deceased persons who respectively made them.'

"The entry in the Bible in the present case was shown to have been made by Mrs. Shipton, and, as she was present in court and had testified to the date of the child's birth, it was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration made several years previously. Nor can it be said that the error was harmless. The evidence was not cumulative, but was of an entirely different character from any other evidence in reference to the child's age, and the jury may well have given it a credit by reason of its formality and apparent authenticity which they would not grant to the living witness who testified respecting the age."

People v. Mayne, 118 Cal. 520.

Then again, it was impossible to present to the jury the doctrine of the Catholic church with reference to the salvation of infants who die without baptism, without at the same time proving that the parents of the child were aware of that doctrine, and even though they may have been aware of the doctrine it is a frequent occurrence that even Catholics do not promptly cause their children to be baptized very soon after birth. This is due to mere negligence or inattention, and then again, by reason of the absence of an available priest or by reason of the inability of Catholic parents to

have a child baptized soon after birth owing to illness, or other detaining causes.

II.

Government Exhibits Nos. 3 and 4, Purporting to Be Photostat Copies of Alleged Affidavits and Pension Applications Made by Mary Phelan, Were Erroneously Admitted in Evidence.

With reference to aforesaid specifications of errors numbered VI, VII and VIII, respectively, we strenuously insist that the court below in each case committed grave error prejudicial to plaintiff in error Phelan. The admission in evidence on the cross-examination of witness Mary Phelan, mother of plaintiff in error, of U. S. Exhibits numbers 3 and 4 is inexcusable. Each of these two exhibits appear to be photostat copies of some original documents apparently claimed to have been signed by the witness Mary Phelan, and neither of which original documents was produced in court, nor was the absence of any of such original documents properly accounted for, nor was Mrs. Phelan ever asked specifically if she had ever made or set forth in her pension applications, specifically describing them, any statement as to the date of the birth of her son, Edward Henry Phelan, plaintiff in error, nor was it proven in any way that Mrs. Phelan had ever signed any of the original documents of which Exhibits 3 and 4 purported to be photostat copies. Each of said Exhibits 3 and 4 was in turn presented to her and she was asked if she had signed either of said documents. She answered that she could not say whether a signature or signatures thereon were hers or not. The questions

in themselves were impossible questions, because the exhibits themselves show that they were photostats and contained no original signatures of Mary Phelan. With the exception of the certificate annexed to each of said exhibits there was nothing in either exhibit except a photographic reproduction of other documents. These documents were introduced in evidence to discredit the testimony of Mary Phelan or to impeach her testimony. It was certainly an easy matter for the Government to have secured the production of the original documents. The Government absolutely controlled the setting of the case for trial. The Government could easily have secured a continuance of the trial for the purpose of securing the originals. This trial was the second trial of the case. When Government counsel was interrogating Mrs. Phelan with respect to Exhibit No. 4, the court itself indicated to Government counsel a line of questioning, when the court made the following statement [Tr. p. 114]: "Well, you may ask her if it is a photographic copy of her handwriting." But Government counsel, even after the court made the suggestion set forth above, did not pursue that method of questioning. There is nothing in the record to prove that the witness Mary Phelan ever signed any of those originals from which the said photostat copies were produced.

As set forth in specification of error No. VIII, Government counsel attempted to show that the entries of the births of the children of the witness were in her own handwriting, but also failing in such attempt. No witness could truthfully testify that any handwriting

appearing in the photostat copies was his or her handwriting. Of course, they could say, if true, that the handwriting appearing in the photostat copies was a photographic reproduction of their own handwriting. Not only was objection made by counsel for plaintiff in error on the introduction of each of said exhibits upon the ground that each was incompetent, irrelevant and immaterial, but also upon the further ground that no proper or sufficient foundation had been laid therefor. Subsequent to the introduction in evidence thereof, and the reading of each of said exhibits to the jury, an attempt was made by counsel for the Government to supply the foundation for the introduction of each of said exhibits by putting on the stand Miss Claya Taylor, a stenographer in the office of the United States Attorney at Los Angeles, and causing her to identify a telegram that it was claimed had been sent by the United States attorney to the attorney general requesting the transmission of the original papers, "proving age and date of birth of Edward Phelan in pension application of Mary Phelan," and also in introducing the evidence of a letter purporting to have been sent to the assistant United States attorney at Los Angeles under date of October 10, 1917, by A. B. Bielaski, who at the time appeared to be chief of Bureau of Investigation in the Department of Justice, in other words, chief detective, and in which letter there appeared Bielaski's statement and conclusion that "The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well." For

some reason or other, the court below conceived the erroneous idea, notwithstanding the heading of the letter itself, "Department of Justice, Bureau of Investigation" [Tr. p. 118], that Bielaski, the writer of the letter, was the chief of the pension department, and that his superior officer, of course, was the commissioner of pensions. That Bielaski was the man who should have charge of these things and send them out, but that he should do it only with permission of his chief or senior officer. [Tr. p. 119.]

Although counsel for plaintiff in error made a special request of the court in the following language [Tr. top of p. 119]: "Before any questions are put, Your Honor, I wish you would personally read this letter." (Referring to the Bielaski letter.) The court understood what letter was referred to by counsel of plaintiff in error, because the court replied in the following language: "That is the one just admitted?" Thereupon counsel for plaintiff in error replied, "Yes. The statements therein contained are hearsay, Your Honor. That is not a statement of the commissioner of patents." Meaning, of course, as subsequently corrected, commissioner of pensions. [Tr. p. 119.] As heretofore clearly shown, Exhibits No. 3 and No. 4 contained statements to the effect that the plaintiff in error was born July 13th, 1886.

There Is No Proper Foundation Laid for the Introduction of the Government's Exhibits 3 and 4.

First: It was not proved that any of the originals, of which these documents purported to be copies, had

been executed, or that Mary Phelan, the witness, had signed any of the originals, nor was the witness asked if she had made any of the statements contained in the said documents.

Second: It was not shown that the original documents could not have been produced or that they were lost.

Third: The copies that were introduced in evidence were not produced from the proper custody.

These documents were *secondary evidence*. Secondary evidence is defined as follows: "Secondary evidence is that which is inferior to primary. Thus a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents." (Cal. C. C. P., section 1830.) Copies of documents certified and in Rev. Stat., Sec. 882, are secondary evidence.

Newsome v. Langford, 174 S. W. 1036.

Proof of the existence of the original instruments must be made before secondary evidence of the instruments or their contents is admissible.

Smith v. Brannan, 13 Cal. 107;

Reynolds v. Lincoln, 71 Cal. 183;

Ford v. Cunningham, 87 Cal. 209, Cyc. 536;

Pepper v. James (Ga.), 67 S. E. 218;

Durbrow v. Hackensack Meadows Company
(N. J.), Atl 59;

Columbia County Bank v. Emerson (Ark.),
143 S. W. 852.

"The deed from Sutter to Brannan was not properly recorded. It is scarcely pretended that it was * * *

It seems from the copy produced that there were subscribing witnesses to the deed. They were not called. The original itself was not produced. Brannan testifies to its loss, but if his testimony was sufficient to let in secondary evidence of the contents (which is by no means clear) the record fails to show any legal evidence of the contents of the deed. The subscribing witnesses were not shown to be without the jurisdiction of the court and their testimony should have been had *at least to the fact of the execution of the paper.*"

Smith v. Brannan, *supra*.

In Reynolds v. Lincoln, *supra*, the action is one brought to quiet title to certain real estate. At the trial the defendant offered in evidence a copy of the article of association of the Sutter Land Company, under whom he claimed. This evidence was excluded and the Supreme Court of California, in commenting upon the exclusion, says:

"We see no error in excluding the paper purporting to be a copy of the articles of association of the Sutter Land Company. *There was no proof that the original of such articles ever existed.*"

Reynolds v. Lincoln, *supra*.

Before a party can be permitted to introduce secondary evidence of the contents of a written contract, deed or other instrument, stated to have been lost or destroyed, satisfactory proof must first be made *of the former existence, proper execution and genuineness of the instrument.*

17 Cyc. 536.

“The offer (to prove terms and provisions of a certain written contract) was made without previous proof of the instrument and due execution of the contract. The non-production under demand of a contract, the existence of which was denied, will not justify proof of its contents by secondary evidence without *first proving its existence*, and due execution.”

Durbrow v. Hackensack Meadow Co., *supra*.

“To justify the admission of secondary evidence as to the contents of a lost deed or a deed without the jurisdiction of the court, not only the existence of the deed must be shown, but it must be shown to have been properly executed.”

Pepper v. James, 67 S. E. 218. Citing Calhoun v. Calhoun, 6 S. E. 913.)

And further quoting from the Calhoun case, the opinion in Pepper v. James, *supra*, continues:

“We think the proper rule of law in regard to the admissibility of secondary evidence is not only that the plaintiff must show the existence of the deed, but that he must show that it was properly executed.”

“To introduce a copy of an instrument or to give evidence of its contents, the party should lay foundation by *some evidence tending to prove that there was a genuine instrument in existence*. The register of policies of insurance kept by the insurance company is nothing more than a private memorandum which ought to have been produced *after proving the existence of an original*.”

U. S. v. The Paul Shearman, 27 Fed. Cases No. 16012.

No showing was made justifying the introduction in evidence of Government's Exhibits 3 and 4, being photostat copies of pension application and affidavits made by Mary Phelan.

As shown above, these exhibits were secondary evidence and no proof of any cause was made as to the loss, destruction or inaccessibility of the original documents, nor was any showing made as to why the originals were not produced, though presumably, from the nature of the documents, they were in the possession of the Government and were actually shown to be in the possession of the Government by the letter of the chief of the Bureau of Investigation of the Department of Justice.

“The burden of proving the facts essential to a proper foundation for the admission of secondary evidence, such as the loss, destruction or inaccessibility of an original instrument rests, of course, on the party seeking to produce the evidence.”

17 Cyc. 539.

Where a party seeks to introduce secondary evidence of the contents of documents, and as a foundation for the introduction of such evidence relies upon the fact that the original writings have been lost or destroyed or are inaccessible to him, he must first establish this fact by sufficient and satisfactory evidence.

17 Cyc. 538.

“No proof of loss of any of these letters was made and of any search for them, nor was any attempt made to account for their non-production. The admission of

this evidence was palpably error. The witness is asked both by court and counsel to testify to the contents of letters without any foundation by proof of loss for the introduction of such secondary evidence."

Byrne v. Byrne, 113 Cal. 294, 299.

"There can be no evidence of a writing other than the writing itself except in the following cases:

"1. When the original has been lost or destroyed, in which case proof of the loss or destruction must first be made.

"2. When the original is in the possession of the party against whom the evidence is given, and he fails to produce it after reasonable notice.

"3. When the original is a record or other document in the custody of a public officer.

"4. When the original has been recorded and the alleged copy of the record is made evidence by this code or other statute.

"5. When the original consists of numerous accounts or other documents. * * * In the cases mentioned in subdivisions 3 and 4 a copy of the original or of the record must be produced. In those mentioned in subdivisions 1 and 2 either a copy or oral evidence of the contents."

Cal. C. C. P., Sec. 1855.

The only one of the above classifications applicable to the documents in question is No. 3, and, as we have heretofore stated, these documents were not records in the custody of a public officer such as were contemplated by the section above cited or by section 882 of the U. S. Rev. Stat.

The Documents Were Not Produced From the Proper Custody.

Government Exhibit 6 [Tr. p. 118], being the letter transmitting the documents admitted in evidence as Government's Exhibits 3 and 4, shows that these exhibits did not come from the custody of the proper department of the Government. They were forwarded by the chief of the Bureau of the Investigations of the Department of Justice, with a statement in the letter transmitting them that "the commissioner of pensions considered it impracticable to send the original papers." We know of no statute or other authority empowering the chief investigator of the Department of Justice to have the custody and control over any documents, papers or records of the Pension Bureau, which rightfully belong in the custody of the Department of the Interior. The statutes providing for the admission under certain circumstances of official documents assume and expressly provide that the same should be forthcoming from the legal custodian.

Cal. C. C. P., Section 1918, Subdivision 9;

Cal. C. C. P., 1919.

In addition to the reasons above given, no proper foundation was laid for the introduction of these Exhibits 3 and 4, because:

- (a) The certificate attached to the copies introduced in evidence was not made by the proper officer.
- (b) The certificate was not made in proper form.
- (c) The certificate was not made under seal.

(d) The exhibits in question were not such records, copies of which the statute contemplates may be introduced in evidence.

United States Rev. Stat., Sec. 882, 3 Fed. Stat. Annotated, page 26, provides:

“Copies of any books, records, papers or documents in any of the executive departments authenticated under the seal of such departments respectively shall be admitted in evidence equally with the original thereof.”

The Pension Bureau is a bureau forming part of the executive Department of the Interior. This record should have been certified by and under the seal of the Department of the Interior. Section 882, above quoted, does not empower the commissioners of the various bureaus to authenticate documents. It provides and contemplates that such authentication shall be made by the executive head of the department and under his seal. In only two cases, to-wit, that of the land office and the patent office, are the commissioners of such offices empowered to make such authentication. This power was expressly conferred on these commissioners by U. S. Rev. Stat., Sec. 891 and 892, and the adoption of these sections clearly shows that the provisions of section 882 did not empower commissioners of bureaus forming part of an executive department to make these authentications; and the express authorization granting specifically to the commissioners of the land and patent offices necessarily excludes from

the exercise of such powers all other commissioners, including the commissioner of pensions.

U.. Rev. Stat., Sec. 882, 891, 892.

The certificate in case of the exhibits under discussion is found as to Exhibit 3 at transcript, page 102, and as to Exhibit 4 at transcript, page 112. These certificates are identical in form, and we quote the first, attached to Exhibit 3:

“Department of the Interior
Pension Department
Washington, D. C.

October 10, 1917.

I, G. M. Saltzgaber, commissioner of pensions and custodian of the records of the Bureau of Pensions, do hereby certify that the attached seven pages are true photostat copies of a deposition made by Mary Phelan, November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, Co. F 12 Vt. Mil. Inf., since allowed by certificate No. 697667 before F. W. Tuckerman, then duly qualified as a special examiner of the Bureau of Pensions.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Pension Bureau to be affixed the day and year above written.

G. M. SATLZGABER,
Commissioner of Pensions.”

To be in the proper form in addition to the certificate of the commissioner of pensions there should have been a certificate from the secretary of the interior.

Ballew v. United States, 160 U. S. 187.

The exhibits in question are not such records, copies of which the statute contemplates authenticated and introduced in evidence.

These affidavits, alleged to have been made by Mary Phelan in applying for a pension, were not such books, records, papers or documents as were contemplated by the statute. The words "documents" and "papers" cannot be held to mean every document or paper on file, but *only such as were made by an officer or agent of the Government* in the course of his official duty.

Block's case, 7 C. T. L. 406.

The Certificate Does Not Bear the Seal of the Department of the Interior.

The certificate of the commissioner of pensions, attached to the document in question and which appears in the transcript at page 102 and page 112, does not bear the seal of the Department of the Interior. Even if these papers were otherwise properly admissible, they are not original, but secondary, evidence, and the authentication should conform strictly to the statute and the seal is a necessary and constituent part of the authentication.

Newsom v. Langford (Tex.), 174 S. W. 1036.

"The principal contention of appellant is that the document lacks an official seal. That the enrollment record, indicated in the Congress Act, being conclusive evidence of the age of Freedmen is a new rule of evidence, and that a party seeking the advantage of said statute should be held to the strict compliance

with the statutory rule of evidence * * * and that as to certified copies we are remitted to either section 882 of the Federal Statutes or to section 3 of the Act of Congress of July 26, 1892. * * * We think the contention of appellant is justified and that the court erred in admitting the particular document in evidence. We are not referred to any statute, except the general statutes mentioned relative to the introduction of certified copies as evidence which would vitalize a purported copy and elevate it to the dignity of original testimony. Without proper authentication, unless there is some statute that would make a copy without more under the purported signature of the commissioner to the Five Civilized Tribes permissible evidence equal to the original record, we are unable to understand how the same could rise to the dignity of original testimony. The seal in this instance which every statute would apply forms a part of the authentication."

Newsom v. Langford, *supra*.

The Act of August 24, 1912, 37 Stat. at Large, p. 498, Suppl. Fed. Stat. Ann. 1914, p. 1975, referred to by the chief of the Bureau of Investigation [Tr. p. 118] is "an act to make uniform changes for copies of record of the Department of the Interior and of its several bureaus," and if it is applicable at all does not serve to remove any of the objections above pointed out. It reads in part as follows:

"That the secretary of the interior, the head of any bureau, office or institution, or any officer of the department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthen-

ticated copies of any official books, records, papers, documents, maps, plates, or diagrams within his custody and charge therefor the following fees * * *."

It will be noticed that while under this statute the heads of bureaus are authorized to furnish authenticated or *unauthenticated* copies, such heads of bureaus are nowhere authorized to authenticate the copies furnished, and section 4 of the same act makes it obligatory to attest the authentication by the use of an official seal.

No Evidence Laid for Impeachment of Mary Phelan.

The evidence contained in Government's Exhibits 3 and 4, being the affidavits and applications of Mary Phelan, was presumably introduced by the Government for the purpose of impeaching her testimony as to the date of the birth of defendant, these exhibits containing statements to the effect that the defendant was born on July 13th, 1886, instead of March 13th, 1886, as testified to by witness. No foundation whatever was laid for such impeaching testimony.

"A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony, but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the

witness before any question is put to him concerning them.”

Cal. C. C. P., Sec. 2052.

The statements alleged to have been made by Mrs. Phelan were not related to her, nor was the time and place of making such statements shown to her, nor was she asked whether she had made such statements, and *she was not shown the original writing claimed to have been made by her*. As above stated, she was shown what purported to be a photographic copy of the alleged writing, and asked if this was her writing. Obviously such testimony did not lay a foundation for an impeachment.

People v. Chang, 74 Cal. 389;

People v. Lee Chuck, 78 Cal. 317;

People v. Nonello, 99 Cal. 333.

III.

Aforesaid specifications, numbered XV and XVI refer to the admission in evidence of U. S. Exhibit No. 5, being a carbon copy of a telegram purporting to have been sent to the attorney general at Washington by O'Connor and reading as follows:

“Send to Special Examiner Uline, Los Angeles, *original papers proving age and birth Edward Phelan in pension application by Mary Phelan* include any other evidence in pension files papers identified telegram October 9th from Saltgiber trial October sixteenth. Rush O'Connor U. S. Atty.” [Tr. p. 117.]

As heretofore stated, there was no justification for the admission in evidence of said carbon copy of said

telegram, and its admission in evidence was prejudicial to plaintiff in error. It is to be noted that said telegram requested the attorney general to send "*the original papers proving age and birth*" of Edward Phelan, and undoubtedly the jury concluded that the age or birth of Edward Phelan, set out in aforesaid photostat copies, U. S. Exhibits No. 3 and No. 4, in themselves proved the age or birth of Edward Phelan, irrespective of the testimony of Edward Phelan, and the testimony of Mary Phelan, his mother, and the testimony of Mrs. Martinez, the only other living person present at Phelan's birth.

The Government introduced no supplementary testimony whatever, which in or by itself proved the birthday of Edward Phelan, plaintiff in error, notwithstanding the promises of counsel for the Government in his opening statement to the effect that the Government would show "that before July 13th, 1886, those people who were in a position to know, acted upon the belief—and they had good grounds for believing—that the plaintiff in error was not in existence, and that his mother and father and his brothers and his sisters and his friends, who knew him, all believed and acted upon the belief that plaintiff in error was born July 13th, 1886."

IV.

Aforesaid specification of error XVII refers to the admission in evidence of U. S. Exhibit No. 6, which consisted of a letter addressed by A. B. Bielaski of the Bureau of Investigation in the Department of

Justice to the assistant United States attorney at Los Angeles, written under date of October 10, 1917, and which U. S. Exhibit No. 6 is in words and figures following, to-wit [Tr. p. 118]:

“Department of Justice. R.L.D.-L.P.

Bureau of Investigation

Washington, October 10-1917.

John R. O'Connor, Esquire, assistant United States attorney, Los Angeles, California.

Dear Sir:

Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the Act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. BIELASKI, *Chief.*”

(Enclosures) B.L.D.

Under aforesaid specification XVII, and also in paragraph II hereof, we criticized the admission in evidence of U. S. Exhibit No. 6. It is unnecessary to repeat that criticism. We respectfully urge that the admission in

evidence of the Bielaski letter, objected to as it was by counsel for plaintiff in error, who noted an exception to the action of the court in overruling such objection, was inexcusable error.

Government Exhibits 5 and 6 were presumably introduced to supply the lack of foundation for the introduction of Exhibits 3 and 4; but neither the telegram from the U. S. Attorney at Los Angeles to the Attorney General at Washington [Exhibit 5, Tr. p. 117], nor the letter in reply from the chief of the bureau of investigation of the department of justice [Exhibit 6, Tr. p. 118], proved either the *existence* or the *execution* of the original documents, or that the originals could not be produced, nor did their introduction remedy any of the defects in the authentication of the copies above pointed out. These exhibits, however, did show that the exhibits 3 and 4 were not produced from the proper custody; the department of justice is not the custodian of the records of the Pension Bureau. Neither did Exhibits 5 and 6 or either of them in any manner make good the failure of the Government to properly lay the foundation for the impeachment of Mary Phelan, which has been noticed above. Of course these exhibits for any purpose other than those above indicated were absolutely incompetent as evidence, being the purest hearsay.

V.

Aforesaid specification of error No. XVIII deals with the introduction in evidence of U. S. Exhibit No. 1, which purported to be Phelan's application for mem-

bership in the Knights of Columbus, and in which application, dated June 14th, 1909, it was set forth that Phelan was born the 13th day of July, 1886. [Tr. p. 47.]

When said application was offered in evidence counsel for plaintiff in error objected to it upon the ground that it was incompetent, irrelevant and immaterial and no sufficient foundation had been shown therefor, which objection was overruled by the court, counsel for plaintiff in error noting an exception. Thereupon said exhibit was introduced in evidence as U. S. Exhibit No. 1, and counsel for the Government proceeded to read said exhibit to the jury, and when Government counsel was in the midst of such reading [Tr. p. 46] the court suggested to Mr. Lawson, counsel for the Government, that he thought probably he ought to prove the signature on the document, inasmuch as counsel for plaintiff in error had objected to its accuracy, stating that simply because the paper bore Phelan's name did not prove its authenticity.

Thereupon the witness Rechsteiner [Tr. p. 46] testified that he had attended the first trial and heard a part of the plaintiff in error's testimony, and that he heard the middle of his testimony regarding the signing of the application. Thereupon counsel for the Government asked the witness this question: "Do you remember whether or not he stated at the time he signed this application?" To which witness replied: "Yes," also "he admitted signing it."

The California Code provides that the handwriting of a witness may be proven as follows:

1. By anyone who saw the writing executed.
2. By evidence of the genuineness of the handwriting of the maker.
3. By a subscribing witness.

California Code Civil Procedure, Sec. 1940.

VI.

Aforesaid specification of error XI relates to the court's action in sustaining the objection of counsel for the Government to the question put by counsel for plaintiff in error to the Government witness, Frank Daven, to this effect: "Did he (referring to Edward Phelan) ever do anything to you to make you feel unkindly to him?" [Tr. p. 67.]

We certainly insist that the action of the court below in sustaining such objection, to which plaintiff in error duly noted an exception, was clearly error. Frank Daven, said Government witness, had testified to a conversation which he claimed had taken place on the first Sunday in May, 1917, to-wit, May 6, 1917, at his home on the Phelan ranch in the presence of his wife and daughter, and in which conversation witness Daven claimed that plaintiff in error had said in effect that he never had to register, that he did not want to get killed going to fight for France and England, and that he would let his whiskers grow and get away up in the mountains, in Nevada some place, and that the board could not find him. It was certainly proper for plaintiff in error to elicit hostility or bias or prejudice against him on the part of said Frank Daven, and, as

we contend, the question was not only proper, but a material one.

VII.

Aforesaid specification of error XII deals with the error of the court in refusing to allow plaintiff in error Edward Henry Phelan, upon the objections of counsel for the Government, to testify and give evidence tending to show that the relations between him and the witness Mrs. Daven were unfriendly, and to which action of the court plaintiff in error duly excepted. [Tr. p. 181.]

The court held that evidence tending to show unfriendly relations between Mrs. Daven and plaintiff in error was immaterial. We earnestly contend that it was indeed very material so far as plaintiff in error was concerned, to show that Mrs. Daven entertained a hostile and unfriendly feeling toward him, because when such unfriendliness or hostility would be disclosed to a fair jury less weight would be assigned to Mrs. Daven's testimony than if the case were otherwise. It will be recalled that Mrs. Daven testified on behalf of the Government to the effect that on the first Sunday in May, to-wit, May 6th, 1917, plaintiff in error had stated that he would not register because he was not going to be killed for any other nation, and he would let his whiskers grow and go out in the mountains, either in Arizona or Nevada. [Tr. p. 49.]

The court's attention is again called to the certainty of the Government witnesses Susie Daven and her husband, Frank Daven, as to this conversation on

the part of Phelan occurring on May 6, 1917, when, as a matter of fact, the conscription law was not enacted by Congress until May 18, 1917. While there may have been discussions in the press regarding the pendency of the measure, it was not known for certain what the limits of the ages of the draft would be until almost the very last day of the session. The Senate had one idea upon the subject and the House another, and it was not until a conference of the committees of each house was held that the age limits were fixed, and in no event was it known on May 6th, 1917, that such a thing as an exemption board would be called into existence. The exemption boards were provided for by the President's proclamation and which was not issued until May 18, 1917, and the details of the matter of conscription were not known until the rules and regulations provided for by the President were made under his direction, and this was after May 18, 1917.

It will be recalled that Frank Daven testified [Tr. top of p. 162], among other things, that Phelan stated that he would let his whiskers grow and get away up in the mountains, up in Nevada some place, "*and the board could not find him.*" Obviously Daven was romancing when he made the reference to the *board*, and certainly with such witnesses as Susie and Frank Daven, it was of the greatest importance, so far as plaintiff in error was concerned, to show that there was hostility, bias or animosity.

VIII.

Aforesaid specification of error XIII deals with the court's refusal to allow plaintiff in error, upon the objection of counsel for the Government, to answer a question put to him by his counsel for the purpose of showing that for years a brother, John Joseph Phelan, had mistakenly regarded and observed July 22 as his birthday, when as a matter of fact, years after it was discovered or ascertained that June 22 was his true birthday. [Tr. p. 83.]

We respectfully urge that such error was prejudicial to plaintiff in error herein. It seems to us that where such a mistake occurs in the same family, it is proper evidence to show that it was neither absurd or unreasonable or out of the ordinary that for a considerable period in the life of plaintiff in error he regarded July 13th, 1886, as a birthday, his mistake was no more unnatural or extraordinary than a similar mistake as to date of birth entertained by a brother.

IX.

Aforesaid specification XIV deals with the court's refusal to allow Mary Phelan, the mother of plaintiff in error, upon objection of counsel for the Government, to testify regarding her other son, John Joseph Phelan, mistakenly observing for a number of years a date in a wrong month as his birthday. [Tr. p. 85.]

We earnestly urge that this error of the court was also material. The same comment hereinbefore set forth with respect to the refusal of the court to allow plaintiff in error to testify to said mistake of his

brother, John Joseph Phelan, applies with equal force to the error complained of in aforesaid specification XIV.

X.

Aforesaid specification XIX refers to the failure of the court to give the instruction requested by plaintiff in error, and which is in the words and figures as follows, to-wit [Tr. p. 129]: "You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the plaintiff in error, Edward H. Phelan, from the mere fact that he was baptized on the 8th day of August, 1886."

Above instruction was requested in view of the testimony of said Harnett regarding the baptism of plaintiff in error by him on August 8th, 1886, and with a view of having the court, in some measure, at least, correct the error made by the court in allowing Father Harnett to testify to the baptism of Phelan on said August 8th, 1886. We earnestly contend that the failure of the court to give the above quoted instruction so requested was error, particularly and especially inasmuch as the Government failed to show any knowledge on the part of the parents of Phelan in the belief of the Catholic church with reference to infants dying without baptism and without proof by the Government there was any enjoined understanding or rule that infants should be baptized as speedily as possible after birth.

XI.

Aforesaid specifications of error XX and XXI and XXII relate to the error of the court in refusing to instruct the jury on the subject of the laws of the state of California, to the effect that such law did not require the person filing a declaration of homestead to set forth therein, either the name or the age or the number of his children, or the dates of their birth. On the cross-examination of Mrs. Phelan, counsel for the Government interrogated her about the homestead declaration that her husband had filed and which was set forth in her petition. [Tr. p. 89 *et seq.*] In view of the fact that the husband's homestead declaration had been read to the jury, setting forth that the declarant's family consisted of "wife and five children," instead of six children, the jury may have been left under the impression that the statement of the declarant, Thomas Phelan, as to the number of his children was correct, and consequently they probably were inclined to attach a greater degree of weight to such unverified statement in said declaration than they would ordinarily had they been instructed that the allegations of that part of the declaration respecting the number of children of the homestead claimant was not a statement that was required to be inserted therein, by the law of California, as it existed at the time said homestead declaration was filed.

XII.

Aforesaid specification XXIII refers to the error of the court in refusing to instruct the jury to return

a verdict acquitting the plaintiff in error, to which refusal of the court plaintiff in error duly excepted.

As stated in said specification no evidence whatever was adduced to prove that part of the charge in the indictment, to-wit: "He, the said Edward H. Phelan, then and there not being an officer or an enlisted man in the national army, or the navy, or the marine corps, or the naval militia, or the national guard in the service of the United States, or an officer in the reserve corps, or an enlisted man in the enlisted reserve in active service." [Tr. top of p. 7.]

Neither, as we contend, was there any definite evidence either introduced by the Government or disclosed upon the examination of any of the witnesses introduced by plaintiff in error directly proving that plaintiff in error was born on July 13th, 1886.

Mrs. Mary Isbell, the Government's only witness as to point of birth, testified that she did not remember that Mrs. Phelan was confined at about the same time that she was confined with her daughter, Rexie Dale [Tr. p. 41], that she couldn't say for certain whether Mrs. Phelan visited her about the time of the birth of her daughter or not, and that she couldn't say because she really did not remember, and that she really could not tell, *and, of course, she did not know anything about when Phelan was born.* [Tr. p. 42.] She declared she couldn't say because she did not know whether or not at the time Mrs. Phelan was confined with plaintiff in error she, the witness, was also confined with her daughter, Rexie Dale; and after being continually pressed as to what her memory of the occurrence was,

she said: "Well, I thought mine was the oldest. Of course, I could not say positively. I don't know anything about how much or anything about it, and I may be wrong in that." [Tr. p. 43.]

Edward H. Phelan testified that he was born March 13th, 1886, and his mother, Mary Phelan, and Mrs. Martinez, who was present at the time of Mrs. Phelan's confinement with her said son, testified that while she did not remember the month that Edward was born in, nevertheless she had had a child born before Edward was born, who was her son Caspar, and that Caspar was born January 6th, and that he was a year and a month or two months older than plaintiff in error. [Tr. p. 20.]

XIII.

The Conduct of the District Attorney in Commenting on the Exclusion of the Evidence of Certain Witnesses Owing to Objections by Defendant's Counsel Was Prejudicially Erroneous.

During the course of his argument to the jury, counsel for the Government commented adversely on the fact that certain witnesses called by the Government had not been permitted to testify, owing to objections made by defendant's counsel. The portion of Government's argument referred to is set out in the transcript at pages 127 and 128. Government's counsel stated, among other things, that defendant's counsel were suppressing the facts, and intimated that such facts, if testified to, would have been highly prejudicial to the defendant. This conduct on the part of

the District Attorney was error extremely prejudicial to the defendant. These remarks were assigned as error. [Tr. p. 128.]

“Where evidence was excluded on the objection of the defendant, it was improper for the District Attorney to comment on the motive of the defense in excluding it, but where the nature of the case was such that the comments could not have injuriously affected the defendant’s cause, the error is not ground for a reversal.”

People v. Romero, 143 Cal. 458.

The argument and insinuations made by counsel for the Government were intended to be and were highly prejudicial to this defendant, and not only did they not receive reproof at the hands of the court, but when defendant’s counsel first objected to them, the court simply ordered the argument to proceed.

Counsel for the Government in making these remarks deliberately invited the jury to go outside of the evidence in the case in considering their verdict, and based his own statements on matters outside of the evidence. This was in violation of the rule as laid down in People v. Weber, 149 Cal. 325 (341).

We respectfully submit that because of errors herein complained of and the reasons hereinbefore set forth, the judgment of the District Court of the United States, Southern District of California, Southern Division, be reversed.

Respectfully submitted,

ISIDORE B. DOCKWEILER,
DOCKWEILER & MOTT,
Attorneys for Plaintiff in Error.

G. C. O’CONNELL,
Of Counsel.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT. 2

Edward H. Phelan, <i>Plaintiff in Error,</i> <i>vs.</i> The United States of America, <i>Defendant in Error.</i>	}
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BRIEF FOR DEFENDANT IN ERROR.

ROBERT O'CONNOR,
United States Attorney;
GORDON LAWSON,
Assistant United States Attorney,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Edward H. Phelan,
Plaintiff in Error,
vs.

The United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

There is apparently but one question of fact involved in this case, i. e., the age of plaintiff in error on June 5, 1917. Was he within the prescribed draft age? That he did not register is conceded by plaintiff in error. [Tr. p. 77.] The question of whether or not he was exempt from registration by virtue of any enlistment in any branch of the military establishment was not raised by plaintiff in error. Had the question been raised, it would be eliminated by the testimony of the

plaintiff in error who admitted his only reason for not registering was that he thought he was not within the age [Tr. p. 77]:

“Had I believed that I was not thirty-one years of age, I certainly would have registered.”

The allegation in the indictment that he was not an officer or enlisted man in any branch of the military establishment of the United States [Tr. p. 7], is a negative allegation and not subject to affirmative proof. The fact that he was such would have been a defense which was not raised at the trial.

The Government contended that the plaintiff in error was thirty years old on June 5, 1917, and, therefore, subject to the draft, and in proof thereof submitted the fact and circumstances of his baptism, the testimony of a life-long neighbor and the direct statement of the plaintiff in error that he was born July 13, 1886 [Tr. p. 47], made at a time—1909—in writing when there was no question of war or draft and on a solemn occasion when he applied for membership in the Order of the Knights of Columbus.

The Government also introduced the testimony of two witnesses to the effect that the plaintiff in error declared his intention to leave the state for the express purpose of evading the draft.

Plaintiff in error then testified that he was born March 13, 1886, but that he had always considered and believed it to be July 13, 1886, until four years ago when his mother told him he was mistaken. [Tr. p. 77.] Mary Phelan testified that plaintiff in error was born March 13, 1886, that this had always been her

belief and she had at no other time thought differently or made any statement of a contrary nature. [Tr. pp. 86 and 87.]

Mary Phelan's testimony was refuted first by United States Exhibit No. 2, which is a petition for an order to set apart a homestead signed and executed by her February 9, 1892 [Tr. pp. 88-94], which set out the statement of her deceased husband that on June 4, 1886, there were five children in existence which did not include plaintiff in error, as he was not then in existence. Mary Phelan said that her husband was mistaken. [Tr. p. 88.] In the second place, in said Exhibit [Tr. p. 93], she made the statement that at the time of her husband's death the plaintiff in error was about two years old. Thomas Phelan, the husband and father, died June 1, 1889. [Tr. p. 89.] If plaintiff in error was born March 13, 1886, he would have been, on June 1, 1889, over three (3) years old.

Mary Phelan's testimony was further impeached. United States Exhibits Nos. 3 and 4, which contained five separate statements by her, made at different times, that the plaintiff in error was born July 13, 1886.

Mrs. Martinez, who, the plaintiff in error alleged, was present at his birth, stated that her son, Gaspar, "is *about* a year and two months older than Edward." [Tr. p. 121.]

The best answer to this is the witness' own testimony [Tr. p. 121] that the source of her knowledge as to her own boy's birthday was given to her by him after she had been subpoenaed in this case. She did not testify as to the time of birth of plaintiff in error.

I.

Plaintiff in error first argues in his brief (p. 54) with reference to specifications of error numbered I, II, III, IV and V. Defendant in error will answer the general questions raised in this group of specifications to conform with the manner of argument adopted by the plaintiff in error.

First of all, the question is raised as to whether or not the witness Father Harnett could testify as to date of birth and whether the baptismal record reciting the date of birth could be introduced for that purpose. The baptismal record was offered for that purpose, and upon objection of plaintiff in error was rejected by the court, and that question is therefore not before this court.

Father Harnett, who officiated at the baptism of the plaintiff in error [Tr. p. 37], testified orally, after refreshing his memory from the record he made in the registry [Tr. p. 35], as to the date of baptism [Tr. p. 37]:

“* * * I baptizd the child, and after referring to the record can state the date of the baptism.

The Court: All right. I think his testimony as to the date of baptism would be better than the record.

Mr. Dockweiler: Yes, Your Honor, if it is competent.

Q. By the Court: Now, what date was the child baptized?

* * * * *

A. I baptized the child on the 8th of August, 1886.”

The fact and date of baptism are not immaterial, as plaintiff in his brief on page 55 alleges. The best answer to that is if plaintiff in error was baptized before June 5, 1886, it would be substantial evidence of his existence before that date, a fact which would have precluded him from the duty of registering on June 5, 1917.

Whitcher v. McLaughlin, 115 Mass. 167, goes even further than the trial court in the case at bar.

Defendants offered in evidence the baptismal records of St. Patrick's parish, in the city of Boston, in which was inserted the following entry: "1852, October 3, James, born the 2d instant, son of Lawrence McLaughlin and Ann, his wife; sponsors John and Ann Tobin, signed Thomas Lynch." Priest testified that baptism is a sacrament in the Catholic church and that the priest is required by the canons of the church to record all baptisms; that no particular rule fixes the time within which infants of confirmed Catholics shall be baptized, but it is generally supposed that children will be baptized within 9 or 11 days under pain of sin. The issue was the age of the defendant. Plaintiff contended that the record was not admissible. Held that the record was admissible and competent to prove age when connected with other evidence.

The balance of the argument of plaintiff in error in regard to the above specifications of error is based upon the following false premises and assumption in brief of plaintiff in error, pages 56-62:

1. Baptismal record was admitted in evidence.

2. That baptismal record was admitted to prove date of birth.

3. That it is assumed defendant in error relies upon pedigree for the admission of such evidence.

It has already been pointed out that oral evidence was adduced by the officiating priest as to the fact and date of baptism—no record was introduced, although defendant in error is convinced that such a record for that purpose would be admissible—and that no question of hearsay is involved, which precludes any discussion as to pedigree which is an exception to the hearsay rule.

As to the doctrine of the Catholic Church with reference to the salvation of infants who die without baptism [Tr. p. 39], it is merely one circumstantial fact. It was also shown that the parents of the plaintiff in error belonged to the Roman Catholic Church. [Tr. p. 38.] That age may be circumstantially proved needs no elaboration.

Whitcher v. McLaughlin, 115 Mass. 167, quoted above.

II.

Plaintiff in error next argues, in regard to specifications of errors VI, VII and VIII, that photostat copies of affidavits and pension applications made by Mary Phelan were erroneously admitted in evidence.

The witness Mary Phelan had testified that the plaintiff in error was born on March 13, 1886, and, continuing, stated [Tr. pp. 86 and 87]:

“I have always been under that impression and always will be, and have never acted any differently or

said differently. I have always held him out as having been born March 13th, 1886. I never gave any other date. I always gave March 13, 1886. Nobody ever asked me anything about it. I did not tell anybody because nobody asked me. I never had any occasion to tell his birthday.

Q. Whenever you had occasion to?

A. I never had any occasion.

Q. Never had any occasion?

A. No, sir; never.

* * * * *

Q. You say that four years ago was the first time that you ever had occasion to give the birthday of Edward to anybody else; is that right?

* * * * *

A. Yes, sir.

Q. That is the first time?

A. That is the first time. I never told anybody what his birthday was before that time. I never was asked and I never told anybody else and never made a statement. I am positive of that."

The same witness further testified [Tr. p. 95]:

"I am now drawing a pension from the Government. I don't remember where I made the application. I have been working at it ever since my husband died. I have made several applications, but I don't remember how many. I tried it a long time and then I stopped for two or three years. I couldn't get it, and then the man back in Washington wrote to me. I don't remember when I finally got it. I couldn't say whether it was eight years ago or not. I don't remember when I first

made the application. I don't remember when I made it. I have made several applications."

Thereupon, Government Exhibits Nos. 3 and 4 were shown to the witness. [Tr. pp. 95 and 96.] Exhibit No. 3 is a deposition made, signed and sworn to by Mary Phelan [Tr. p. 101] before a special examiner of the Bureau of Pensions [Tr. p. 98], on the 10th day of November, 1909. Among other things therein set out is the statement that the plaintiff in error was born July 13, 1886, and that said record was in her family Bible [Tr. p. 100], and also the statement that she had made several applications for pension. She did not know how many and that the applications which were shown to her at that time were dated October 12, 1889, May 12, 1908, and August 15, 1890, and bore her signature and were executed by her. [Tr. pp. 98 and 99.]

United States Exhibit No. 4 [Tr. pp. 103-113] consists of three applications for pension dated October 12, 1889, August 15, 1890 and May 12, 1908, respectively. In each and every one of these applications, the birthday of the plaintiff in error is given as July 13, 1886 [Tr. pp. 105, 107 and 110.] This exhibit also contains a proof of a birth dated October 3, 1892, wherein the birthday of plaintiff in error is likewise set out as July 13, 1886. The above documents all signed and executed by Mary Phelan.

Defendant in error calls the attention of the court to the identity of the dates of the applications referred to in United States Exhibit 3 and the applications in

United States Exhibit 4. To the introduction of these exhibits the plaintiff in error objects on the grounds that they are incompetent, irrelevant and immaterial, and that no proper foundation had been laid. [Tr. pp. 97 and 102.] The relevancy and materiality of this evidence is manifest. Its competency is equally apparent. (See Fed. Stat. Annot., Vol. 3, Sec. 882, p. 26):

“(Copies of department records and papers.) Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof.”

Act of Aug. 24, 1912, 37 Stat. at Large, p. 498; also Fed. Stat. Ann. Supplement 1914, p. 175, sections 1 in part and 3 and 4:

Sec. 1. “(Copies of records to be furnished—schedule of fees—verification—no charge for official use—authenticated copies of printed rules, etc.) That the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, plats, or diagrams within his custody, and charge therefor the following fees:”

Sec. 3. “(Acceptance as evidence.) That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof.”

Sec. 4. “(Use of seal.) That all officers who furnish authenticated copies under this act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose.”

Plaintiff in error first argues that no proper foundation was laid. (Brief of Plaintiff in Error pp. 65-70.)

Mary Phelan testified as follows [Brief of Plaintiff in Error p. 95; Tr. p. 96]:

“The Court: Let it be marked Exhibit 3.

(The document so offered and identified was thereupon marked ‘United States Exhibit No. 3’).

Q. By Mr. Lawson: Isn’t this your signature? (Exhibiting document to witness.)

A. I will have to say as I did to the other one, it looks like my signature, but I can’t remember signing it.

Q. It looks like your signature?

A. Yes, sir.”

The witness’ reference “to the other one” was United States Exhibit No. 2, the only other document that had been submitted to her up to that time. She testified regarding her signature to that document as follows [Tr. p. 88]:

“That looks like my signature on the document you handed me. It is not like I write now. It looks like it at that time. * * * That looks like my signature; it looks like it. They did not read it to me, and I did not know what was in it. Whoever wrote it did not know anything about it. That is my statement and my signature.”

The witness, therefore, did testify that the signature to United States Exhibit No. 3 appeared to be her signature at the time of making it, though not like her present signature. No one was better qualified to testify than this witness.

The utter futility of asking this witness whether or not she had made the statements contained in United States Exhibit No. 3 as a necessary step to lay a foundation for its introduction as evidence is patent from her testimony on page 88, above referred to. Not only would it have been futile, but the proper procedure was to submit the document to the witness and ask her whether or not it was her writing.

Greenleaf on Evidence, Sec. 465:

"A witness cannot be asked on cross-examination whether he has written such a thing, stating its particular nature or purport; the proper course being to put the writing into his hands and ask him whether it is his writing."

Also

Jones on Evidence, Sec. 847:

"Contradictory written statements—mode of procedure.—Witnesses may be impeached by producing their written statements, for example, their letters, affidavits, depositions or the like, which are inconsistent with the testimony given at the trial. Thus, where the witness testified that the plaintiff had been discharged from service for neglect of duty, a letter of the witness stating that the plaintiff had performed efficient service was held admissible. But the witness cannot, in the

first instance, be asked as to the contents of what he has thus written, since this would be a violation of the familiar rule as to best evidence. This is the rule maintained in nearly all jurisdictions in this country and in many states is declared by statute. If the question is asked whether the witness had made certain representations, his counsel has the right to ascertain whether the representations or statement was written or oral, and, if it appears to have been in writing, the paper should be produced before he is compelled to answer."

The statement of witness that she was now drawing a pension and that she had made several applications for the same at intervals, together with the identification of her signature, is sufficient proof of the execution of United States Exhibit No. 3, which exhibit is proof of the execution of United States Exhibit No. 4 [Tr. pp. 98 and 99]:

"I made several applications for pensions. I do not know how many. The applications now shown me, dated October 12th, 1889, May 12th, 1908, and August 15th, 1890, bear my signatures and were executed by me before the several officers named therein, and the witnesses named were present at the several dates of execution thereof."

Moreover, the witness Mary Phelan testified in the same way as to her signature to United States Exhibit No. 4. [Tr. pp. 96 and 97.]

It should also be borne in mind that United States Exhibit No. 2 was then in evidence and bore the ad-

mitted signature of Mary Phelan [Tr. p. 88], and the jury, therefore, had the right to compare that signature with the signature on United States Exhibits Nos. 3 and 4.

The argument of plaintiff in error (in his brief) on this point, that no proper foundation was laid for the introduction of Government's Exhibits 3 and 4, is further predicated on the theory that these documents are secondary evidence. (Brief of Plaintiff in Error, p. 66.) These documents are specifically designated as primary evidence. To consider these documents as secondary evidence would defeat the very purpose of the statutes.

Sec. 882, Fed. Statutes Ann., Vol. 3, p. 26,
quoted above;

37 Stat at Large, Vol. I, Chap. 370, p. 497;
quoted above;

Fed. Stat. Ann. Supplement 1914, p. 175.

Cases cited by plaintiff in error are not in point. Those cases turned upon the admissibility of copies of original documents and did not involve the admissibility of copies of public documents for documents in the custody of the Government. There was also not involved a statute that gives the right to admit copies of documents, papers, etcetera, on file with the Government equally with the originals thereof.

Fed. Statutes Ann. Supp. 1914, p. 175, Sec. 4;
quoted above.

That United States Exhibits 3 and 4 are included in the statutes there can be no question. (Statutes above cited.)

It is next argued by plaintiff in error in his brief (p. 171) that the documents (referring to United States Exhibits 3 and 4) were not produced from the proper custody, basing his chief reliance upon the fact that he knew of "no statute or other authority empowering the chief investigator of the Department of Justice to have the custody and control over any documents, papers, or records of the Pension Bureau which rightfully belong in the custody of the Department of the Interior."

The documents themselves in the certificate and seal thereof are the best evidence of source from which they issued. Plaintiff in error again makes the mistake of hypothecating his conclusion on the false presumption that these documents are secondary evidence.

Under the discussion of this point, plaintiff in error again raises various objections to the end that no proper foundation was laid for the introduction of United States Exhibits 3 and 4. (Brief of Plaintiff in Error pp. 71 and 72.)

"(a) The certificate attached to the copies introduced in evidence was not made by the proper officer." Fed. Stat. Ann. Supp. 1914, Sec. 1, gives "a head of a bureau" the specific authority.

The documents in question were made and authenticated by the Commissioner of Pensions, the head of the Pension Bureau.

"(b) The certificate was not made in proper form. A general objection which merits no reply.

"(c) The certificate was not made under seal."

By order of the trial court, these documents have been forwarded for the inspection of the United States District Court of Appeals in answer to this objection.

(d) "The exhibits in question were not such records copies of which the statute contemplates may be introduced in evidence" (p. 72).

In addition to Sec. 882, Vol. 3, Fed. Stat. Ann., p. 26, quoted by plaintiff in error in his brief (p. 72), the following is herewith submitted:

Fed. Stat. Ann. Supp. 1914, p. 175:

Sec. 1. "That the Secretary of the Interior, *the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, * * **"

Sec. 3. "That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof."

Sec. 4. "That *all officers* who furnish authenticated copies under this act *shall attest* their authentication *by the use of an official seal which is hereby authorized for that purpose.*"

By Sec. 1 in above act, the documents or papers in question which were in the Bureau of Pensions were obviously contemplated and included, and the head of that bureau mentioned in said section was manifestly

given the power to authenticate and attest them by an official seal. (Sec. 4 of said Act.)

The formalities were all observed and the documents themselves attest this. The argument of plaintiff in error in his brief (p. 72) that the seal was not in the required form appears somewhat captious.

Ballew v. U. S., 160 U. S. 187:

“During the trial of Ballew in connection with a fraud perpetrated by him in withholding part of pension from a pensioner of the United States, a page from the records of the pension office was introduced and admitted in evidence over objection of counsel for accused, which admission was assigned as error to this court. HELD: Objection was that certificate was improperly authenticated because signed by acting Secretary of the Interior under seal of department, and referred only to official character of Commissioners of Pensions and the faith and credit to which his attestations were entitled, citing Rev. Stat., Sec. 882. Copy was proceeded with certificate signed by Commissioner of Pensions, certifying that the copy was a true copy of the original; the pension office was but a part of the Department of the Interior, and the certificates, taken together, were a substantial compliance with the statute.”

In reply to the argument of plaintiff in error, on page 76 of brief of plaintiff in error, to the effect that no evidence was laid for the impeachment of Mary Phelan has been above answered and it is again pointed out that in the cross-examination of Mary Phelan in

regard to whatever former statements that she may have made in regard to the birth or age of the plaintiff in error, the latter did not demand to know whether those statements referred to were in writing.

III.

Specifications numbered XV, XVI, XVII, next discussed by plaintiff in error in his brief (pp. 77-70), relate to correspondence between the United States Attorney and the Department of Justice and the Bureau of Pensions with reference to the efforts of the United States Attorney to secure the originals of the photostat copies contained in United States Exhibits Nos. 3 and 4.

As previously discussed, there is no question of secondary evidence involved and such evidence was unnecessary to lay a foundation. The documents, United States Exhibits Nos. 3 and 4, are made primary evidence by statute. Even though such evidence were required, the Exhibits 5 and 6 speak for themselves, quoted by plaintiff in error in his brief on pages 77 and 79 and transcript pages 116-118, to the end that the United States Attorney endeavored to get the originals and the photostat copies were sent instead with the opinion from Washington that such would answer the purpose equally as well as the originals, which, according to the statutes above referred to, the defendant in error thinks is sound.

Specification XVIII (brief of plaintiff in error, pp. 80-82) refers to the introduction of United States Exhibit No. 1. Plaintiff in error admitted signing the

document [Tr. p. 46], which is ample proof of its execution.

Specifications of error XI, XII, XIII, XIV deal with subjects that the court refused to allow plaintiff in error to inquire into (brief of plaintiff in error, pp. 82-86). The discussion of plaintiff in error himself reveals the collateral nature of the facts he sought to solicit.

The other specifications of error are not of sufficient importance to discuss. Plaintiff in error, however, comments upon remarks made by counsel for the Government to the jury [Tr. pp. 127 and 128].

Counsel for plaintiff in error invited counsel for defendant in error to go outside of the record [Tr. p. 127]. Mr. Dockweiler stated to the jury:

“The first witness called by the prosecution was a gentleman by the name of George T. Jeffries, deputy county recorder. He testified to nothing that is before you.”

Defendant in error had the right to correct the impression left by such a remark. Even though this be not so, the jury were instructed by the court as follows [Tr. p. 128]:

“The jury will not consider the remarks of the United States Attorney, coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded.”

This cured the error, if any was made. In any event, the record discloses no willful abuse of privileges and rights accorded to counsel. Clearly no persistent

abuse indicating animus in the mind of counsel, or impressions left that were likely to create prejudice in the minds of the jurors.

Chadwick v. U. S., 141 Fed. 225;
Diminick v. U. S., 135 Fed. 257-121 Fed. 638;
Carlisle v. U. S., 194 Fed. 827;
Ammerman v. U. S., 185 Fed. 1-710;
Woods v. U. S., 174 Fed. 651;
Richards v. U. S., 175 Fed. 911;
Carroll v. U. S., 154 Fed. 425;
U. S. v. Snyder, 14 Fed. 554;
Dunlap v. U. S., 165 U. S. 486.

We respectfully submit that no errors prejudicial to the rights of the plaintiff in error have been committed, and, therefore, that the judgment of the District Court be affirmed.

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Attorneys for Defendant in Error.

No. 3086.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Edward H. Phelan,	}
<i>Paintiff in Error,</i>	
<i>vs.</i>	
United States of America,	
<i>Defendant in Error.</i>	

Petition of Plaintiff in Error for a Rehearing.

ISIDORE B. DOCKWEILER,
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MAR 28 1912

No. 3086.

United States
Circuit Court of Appeals,
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Edward H. Phelan,

Paintiff in Error,

vs.

United States of America,

Defendant in Error.

Petition of Plaintiff in Error for a Rehearing.

STATEMENT.

Plaintiff in error was convicted in the lower court of failure to register for military service in accordance with an Act of Congress of May 18th, 1917, requiring all males over the age of twenty-one and not yet thirty-one on June 5th, 1917, to so register. Plaintiff in error appealed to this court, and on April the 1st, 1918, this court rendered an opinion affirming the judgment of the lower court. The offense with which plaintiff in error is charged is of such a grave and serious nature, involving, as it does, his loyalty to his country, that

we feel justified in saying that no graver charge, not excluding that of the taking of human life, could have been placed against him. The consequences of a conviction on such a charge as this, if finally sustained, will be to indelibly brand the plaintiff in error as a traitor to his country in her hour of need, to make him forever an outcast among his fellow-citizens, and to fasten this ignominious blot upon all near and dear to him and on his children and grandchildren yet unborn.

Plaintiff in error in good faith contends that he was born on March 13th, 1886, which would place him over the draft age on June 5th, 1917; that he honestly believed and does still believe that to be the fact and that by reason thereof he understood he was immune from registration, and had he felt otherwise he certainly would have registered. [Tr. p. 77.]

Plaintiff in error is not seeking to avoid his patriotic duty. Earnestly believing himself innocent of the crime charged, he seeks to remove the stain placed upon his good name by his conviction thereof and if successful in his endeavor he will forthwith gladly and ungrudgingly offer his services to his country and enlist. With that end in view and having in mind the extreme gravity of the charge against him, plaintiff in error respectfully requests this Honorable Court to examine again the record of his conviction, particularly with reference to those matters not adverted to in the opinion affirming the judgment, confident that a careful reconsideration of such record will move the court to grant this plaintiff in error the rehearing which he herewith respectfully requests.

Only Three Assigned Errors Discussed in Court's Opinion.

The transcript in this case discloses that there were no fewer than fifty-two assignments of error made; seventeen of these concern matter of the admission or rejection of evidence, and the balance concern the giving or refusal of instructions to the jury. These assignments were all made in good faith and a large number of them were treated at considerable length in the brief of plaintiff in error. Only three of these assignments are noticed by the court in its opinion affirming the judgment and these three deal with:

(a) The admission of certain testimony of Monsignor Harnett with reference to the baptism of the plaintiff in error and the doctrine of the Catholic church on the subject of infant baptism.

(b) The admission in evidence of copies of certain records of the pension bureau.

(c) Certain alleged misconduct of the district attorney during the trial.

The following alleged errors were not touched upon by the court in its opinion affirming the judgment, and in view of their importance and our firm belief that they are well taken and that each of them is of sufficient importance to in itself warrant the reversal of the judgment, we have thought perhaps they were not sufficiently called to the court's attention in the brief of plaintiff in error, and we accordingly set them forth here as briefly and succinctly as their importance will permit, and earnestly request the court's close consideration of them.

Assigned Errors Not Touched Upon in the Court's Opinion.

1. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO SHOW THE EXISTENCE OF BIAS AND PREJUDICE AGAINST HIM ON THE PART OF THE WITNESS FRANK DAVEN.

2. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY MUST NOT PRESUME, CONJECTURE, GUESS, OR ARRIVE AT ANY CONCLUSION AS TO THE AGE OF THE PLAINTIFF IN ERROR FROM THE FACT THAT HE WAS BAPTIZED ON A CERTAIN DATE.

3. THE COURT ERRED IN ALLOWING TO BE INTRODUCED IN EVIDENCE AND READ TO THE JURY A CARBON COPY OF A TELEGRAM SENT BY THE UNITED STATES DISTRICT ATTORNEY TO THE ATTORNEY-GENERAL.

4. THE COURT ERRED IN ALLOWING TO BE INTRODUCED IN EVIDENCE AND READ TO THE JURY A LETTER FROM THE CHIEF OF THE DEPARTMENT OF JUSTICE AT WASHINGTON TO THE UNITED STATES ATTORNEY AT LOS ANGELES.

5. THERE WAS NO SHOWING ON THE TRIAL OF THIS ACTION THAT THE DEFENDANT WAS NOT AN OFFICER OR AN ENLISTED MAN OF THE REGULAR ARMY, OR THE NAVY, OR OF THE NATIONAL GUARD, OR OF THE NAVAL MILITIA, WHILE IN THE SERVICE OF THE UNITED STATES.

Each of the points above mentioned was assigned as error. We will now take these points up briefly, in the order in which they are set out.

I.

The Court Erred in Refusing to Allow the Defendant to Show the Existence of Bias and Prejudice Against Him on the Part of the Witness Frank Daven.

At the trial of this case one Frank Daven was called as a witness by the Government and testified that he knew the defendant and his mother; that he had worked on the same ranch as the defendant; that on the first Sunday in May, being the 6th of May, 1917, he had a conversation with the defendant on his ranch in regard to military service; that his wife and daughter were present at the time; that at that conversation the defendant said "that he did not want to get killed for France and England and then go to war, he let his whiskers grow and get away up in the mountains, up in Nevada some place, and the board could not find him." [Tr. pp. 61, 62.]

On cross-examination by counsel for the defendant, this witness was asked the following question:

"Q. Isn't it a fact that your wife became quite unfriendly to the defendant Phelan because of some advice that Mr. Phelan gave to you and some assistance he gave to you immediately following the departure of your wife from the ranch?" [Tr. p. 65.]

Again, the same witness was asked the following question:

"Q. Did your wife ever express to you any feeling of hostility regarding Edward Phelan because of some assistance that Edward Phelan rendered you following

the departure of your wife from the ranch?" [Tr. p. 66.]

Again, the same witness was asked:

"Q. About the time that you left the ranch, did you have any conversation with the defendant, Edward Phelan, respecting your wife and her departure?" [Tr. p. 66.]

And again, this question was put to the witness:

"Q. Did he (referring to the defendant) ever do anything to you to make you feel unkindly toward him?" [Tr. p. 67.]

To all of these questions an objection was sustained by the court on the ground that they either called for a conclusion of the witness or were hearsay or incompetent, irrelevant and immaterial. The refusal to permit these questions to be answered was assigned as error by the defendant. [Tr. pp. 165, 166.]

Again, when the defendant was testifying on his own behalf the following question was put to him by his counsel:

"Q. Mr. Phelan, with reference to the Davens, what, if anything, occurred near or about the first part of May in connection with Mrs. Daven and your relationship with Mrs. Daven in reference thereto?" [Tr. p. 80.] (Mrs. Daven had also been a witness for the Government.)

To which question an objection was sustained, on the ground that the same was incompetent, irrelevant

and immaterial. This ruling was assigned as error by the defendant. [Tr. pp. 166, 167.]

These questions were clearly designed to show bias and prejudice on the part of the witness Daven against the defendant Phelan, and it is elementary that a defendant in a criminal action is entitled to show such bias or prejudice.

Jones on Evidence (2nd Ed.), Sec. 828;

People v. Thompson, 92 Cal. 506;

People v. Worthington, 105 Cal. 166;

People v. Lee Ah Chuck, 66 Cal. 662;

People v. Webber, 26 Cal. App. 413;

Wigmore on Evidence, Vol. 2, Secs. 948-968.

“It is always competent to show that a witness is hostile to the party against whom he is called, that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile than that of an indifferent or friendly witness; hence it is always competent to show the relations which exist between the witness and the party against, as well as the one for whom, he is called. If the witness denies his hostility or bias, this may be proven by other witnesses. The cross-examination would be of little value if the witness could not be freely interrogated as to his motives, bias and interest, or as to his conduct as connected with the parties or the cause of action, and there would be little safety in judicial proceedings if an unscrupulous witness could conclude the adverse party by his statements denying his prejudice or interest in the controversy. * * * For the purpose of affecting the credibility of a witness he

may be cross-examined * * * as to his state of feeling toward the respective parties. * * * It has frequently been held that it is error not to permit cross-examination as to the state of feeling or bias of the witness, but the extent of such cross-examination is within the sound discretion of the court; although it is the general practice to first interrogate the witness on cross-examination as to his feelings of bias or hostility, yet it is proper to prove the hostility of the witness by other competent witnesses who can swear to the fact."

Jones on Evidence (2nd Ed.), Sec. 828.

The Supreme Court of California lays down the rule in this respect as follows:

"It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interest involved, his hostility or friendship toward the parties, are always proper matters for investigation in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone."

People v. Thompson, 92 Cal. 506 (509).

Again, in *People v. Webber*, *supra*, the District Court of Appeals of California, in holding that certain questions tending to show hostility should properly have been allowed on cross-examination, said:

“It is elementary that the defendant was entitled to ask such question, and it was a matter of no little consequence to him to bring out the fact, if it were a fact, that the witness was biased and prejudiced against him in order that the jury, in weighing his testimony, might take that circumstance into consideration.”

People v. Webber, 26 Cal. App. 413 (416).

The rule is elementary and the authorities in the different jurisdictions are in accord with those above cited. In the case at bar there was testimony showing that Mrs. Daven, the wife of Frank Daven, had left the Phelan ranch, where she and her husband were employed, before her husband did. [Tr. p. 48.] The testimony of Frank Daven was undoubtedly very prejudicial to the defendant. Besides, there was a peculiar feature connected with his testimony, in that he placed the conversation had with the defendant, in which the defendant is alleged to have stated that he would go some place where “the board” could not find him, as occurring on the 6th day of May, 1917, some time before the Selective Service Law was passed, and before it was known that it would be passed, and before anyone surmised what machinery would be used in its operation. It was of vital importance to the defendant to show any reason there may have been for Daven entertaining a feeling of hostility towards him. If there had been some difficulty between the Davens and himself, which involved the conduct of Mrs. Daven, as intimated by the questions asked, it would be highly important that the jury should have this matter before them in passing upon the credibility to which Daven’s

testimony was entitled and the weight that should be given to it. By the ruling of the trial court, this testimony was entirely excluded, not only on the cross-examination of Daven, but on the direct examination of the defendant himself. The ruling of the trial court in this respect was prejudicial error, sufficient in and of itself to warrant a reversal of the judgment.

II.

The Court Erred in Refusing to Instruct the Jury That They Must Not Presume, Conjecture, Guess or Arrive at Any Conclusion as to the Age of the Plaintiff in Error From the Fact That He Was Baptized on a Certain Date.

Plaintiff in error requested the court to instruct the jury as follows:

“You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the defendant, Edward H. Phelan, from the mere fact that he was baptized on the 8th of August, 1886.”

The court refused to give this instruction and plaintiff in error duly excepted to such refusal and such refusal is assigned by him as error. [Tr. p. 172, assignment No. 18.] In its opinion affirming the judgment this court, as we contend, erroneously, stated that the question involved in this case was whether or not plaintiff in error was born March 13, 1886, as he contended, or on July 13, 1886, as claimed by the Government. The real question was: *Did the plaintiff in error honestly believe he was born March 13, 1886; and acting on such honest belief fail to register, or did*

he wilfully fail and refuse to present himself for registration? Father Harnett, a witness for the Government, over the objection of plaintiff in error, testified that he baptized plaintiff on the 8th day of August, 1886. [Tr. p. 38.] There was no issue in the case as to when plaintiff in error was baptized and the utmost that the testimony of Father Harnett proved was that plaintiff in error was in existence on the date of his baptism, August 8, 1886. The Government's contention is that the plaintiff in error was not in existence until the 13th day of July, 1886. From the testimony of Father Harnett that he baptized the child on the 8th of August, the jury were asked to infer that the child could not have been born or have been in existence on the 13th of March, as was his contention. We submit that such evidence was far too remote to permit the jury to indulge in any such inference.

Jones on Evidence, Sec. 137;

U. S. v. Ross, 92 U. S. 281, 23 L. C. P. Co. 707;

First Natl. Bank v. Stewart, 114 U. S. 224, 29

L. C. P. Co. 101.

The date of baptism of the plaintiff in error was assuredly not a fact from which the date of his birth, which was one of the facts in issue, could be presumed or was logically inferable. Such facts only are admissible in evidence.

California Code of Civil Procedure, Sec. 1870,

Sub. 15.

“Although as a rule testimony should not be classed as irrelevant on the ground that it may have but little weight, yet the law requires an open and indisputable connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.”

Jones on Evidence, Sec. 137.

In the case of *U. S. v. Ross, supra*, Ross was claiming the proceeds of a certain fund in the treasury of the United States alleged to have accrued there as a result of the sale of certain bales of cotton that had fallen into the hands of the United States Government during the Civil War, and the claim was made under an act dealing with such captured or abandoned property. The proof showed that the claimant in May, 1864, owned thirty-one bales of cotton then in a warehouse in Rome, Georgia; that on the 18th of that month Rome was captured by the United States forces and shortly afterwards the cotton was removed on Government wagons to a warehouse adjoining the road leading from Rome to Kingston, and connecting there with the road leading to Chattanooga. Whether this was the only cotton in that warehouse was not found, but it was fairly to be inferred from other facts that it was not. Subsequently all the cotton in that warehouse was shipped to Kingston by the military authorities. It was shown that a shipment of cotton arrived in Kingston from Rome August 19th, 1864, and was forwarded to Chattanooga; that on the 19th of August forty-two bales of cotton were received at Chattanooga from Kingston and from there were shipped to Nash-

ville, where they were turned over to the treasury agent and sold. The proceeds were turned over to the United States treasury. From these facts the court deduced as a presumption of law that the thirty-one bales recovered from the Government warehouse as stated were a part of the forty-two bales received from Nashville. In discussing the rightfulness of this presumption the Supreme Court of the United States said:

“It is obvious that this presumption could have been made only by piling inference upon inference and presumption upon presumption. * * * These (referring to the inferences necessarily taken by the court in arriving at its conclusion) seem to us to be nothing more than conjectures. They are not logical inferences even to establish a fact, much less are they presumptions of law. They are inferences from inferences, presumptions resting upon the basis of another presumption. *Such a method of arriving at a conclusion of fact is generally, if not universally, inadmissible.* No inference of fact or of law is reliable, drawn from premises which are uncertain. * * * The law requires an open and indisputable connection between the principal and evidentiary facts and the deductions from them and does not permit a decision to be made on remote inferences. A presumption which the jury is to make is not a circumstance in proof and it is not therefore a legitimate foundation for a presumption.”

U. S. v. Ross, *supra*.

The above case was cited with approval in the Supreme Court of the United States in the case of First National Bank v. Stewart, *supra*, where the question

in issue was as to the payment or non-payment of a certain note, and evidence was offered as to the insolvency of the person claiming to have paid the same. The Supreme Court said:

“The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely, whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and to leave some unpaid.”

First National Bank v. Stewart, *supra*.

The decisions of the Supreme Court of the United States above cited on what constitutes remote inference in matters of evidence were rendered in civil cases, and we submit that the rule there laid down should be applied with a great deal more care in criminal decisions, especially in those involving, as does the case we are considering, the most serious criminal offense with which any person could be charged, not excluding even that of murder.

Turning to the evidence in this case, it was sought to have the jury infer that July 13th, 1886, was the date of birth, from the date of the baptism of the plaintiff in error, from the fact that he was baptized by a Catholic priest and from the fact that that Catholic priest testified, over vigorous objections from the plaintiff in error, that the doctrine of the Catholic church as to infant baptism was that no child that is unbaptized and dies before it attains the use of reason can enter into the kingdom of heaven [Tr. p. 39], although there was not a particle of evidence showing

that that doctrine was known to the parents of the child either at the time of its birth or baptism or at any other time, or that the child's parents would not have permitted him to remain unbaptized for a longer period than twenty-five days after his birth, that is to say, the period of time elapsing from the 13th of July until the 8th of August. And it was further sought to have the jury conclude, and they unquestionably did conclude, that on account of the matters stated it was not possible that the plaintiff in error could have been born on the 13th of March and have been allowed to remain unbaptized from that time until the 8th of August, a period of four months and twenty-five days. With the Supreme Court of the United States in the Cook case, we say that such a presumption arrived at by the jury could only have been reached "by piling inference upon inference and presumption upon presumption," and, as said in the Stewart case, the evidence "was too weak and vague to contribute to an intelligent decision by the jury of the question in issue." As said by the Supreme Court in the Stewart case, "it is common for both solvent and insolvent men to pay some of their debts and leave some unpaid." It is also common for parents to baptize their children or have them baptized immediately after birth. It is equally common for them to postpone baptism for weeks and months and even years after birth, and when the fact is recalled that the plaintiff in error in this case was born over thirty years ago on a ranch which was then in a remote country district, no matter what the religious belief of the child's parents may have been,

whether they were Catholic or Protestant, it would have been not at all unusual to have postponed the ceremony of baptism for a period of four months, or even longer.

We submit that the jury should have been instructed as requested by the plaintiff in error, and that the refusal of the court to so instruct was prejudicial in the extreme, and in considering this point we respectfully request the court to also consider the matter which was discussed at some length in the brief of plaintiff in error and which is herein further adverted to, to-wit: the grave error, as we contend, of permitting Father Harnett to testify as to the doctrine of the Catholic church with reference to infant baptism and consequently early baptism, without also proving a knowledge of such doctrine on the part of the baptized child's parents. Proof of baptism alone would in this case merely prove the existence of Phelan on the date of baptism, to-wit: August 8, 1886. This last fact alone was wholly immaterial, because the Government contended for the previous existence of Phelan on July 13th, 1886, and Phelan himself claimed birth on March 13th, 1886. Obviously, no one questioned, but all admitted the existence of Phelan in August, 1886. Then to prove it was only to provide the jury with an unlawful and unjustifiable inference as to Phelan's birth in July.

III.

The Court Erred in Allowing to Be Introduced in Evidence and Read to the Jury a Carbon Copy of a Telegram Sent by the United States District Attorney to the Attorney General.

During the examination of Mrs. Mary Phelan, the mother of the defendant, as a witness on his behalf, and while the Government was endeavoring without success [Tr. pp. 113, 114] to prove the execution by Mrs. Phelan of certain affidavits in connection with applications alleged to have been made by her to the Government for a pension, and which affidavits and applications were introduced in evidence over the objection of the defendant as Government's Exhibits 3 and 4, the Government called out of order [Tr. p. 115] a witness, Clara Taylor. Miss Taylor testified that she was a clerk and stenographer in the office of the United States district attorney at Los Angeles; that she had partial custody of the filing of papers, and that she sent telegrams. She then identified a carbon copy of a telegram as one that she had sent from the office of the United States attorney. Thereupon, over the objection of defendant that the same was incompetent, irrelevant and immaterial, and no foundation laid, and that it was not the best evidence [Tr. p. 116], the carbon copy of this telegram was received in evidence and was read to the jury. The telegram in question is as follows:

“Los Angeles, Cal., 10/9/17.

“Attorney General, Washington, D. C.

“Send to special examiner Uline Los Angeles original papers *proving age and birth Edward Phelan* in pension application by Mary Phelan include any other evidence in pension files papers identified telegram October Ninth from Saltzgaber Trial October Sixteenth Rush O’CONNOR, U. S. Atty.”

This evidence was introduced by the Government either as direct evidence of an essential fact in the case or to prove the existence or the execution of the pension affidavits mentioned or to show that the originals of these pension affidavits could not be produced, or to lay the foundation to impeach Mary Phelan.

From the wording of the telegram it will be at once seen how extremely harmful and prejudicial its admission was to the defendant. It unquestionably impressed the jury with the fact that the United States district attorney here and the attorney general in Washington considered and were of the opinion that the pension affidavits in question *proved the age and birth of Edward Phelan*. Now, if this telegram was introduced by the Government for the purpose of showing, either directly or indirectly, the date of Phelan’s birth, it was pure hearsay, and hearsay of a kind most damaging and prejudicial to the defendant. It is elementary that written statements are equally objectionable as hearsay as oral statements.

“Obviously statements in the form of letters are not more entitled to be received in evidence than mere verbal statements, and unless they are com-

petent as part of the *res gestae* or as admissions or under some other general rule of evidence, they should be rejected."

Jones on Evidence (2nd Ed.), Sec. 583.

This telegram was just as objectionable as the newspaper articles and telegrams introduced in evidence in the case of

Salo v. Duluth & I. R. R. Co., 140 N. W. 188, in which case plaintiff was seeking to recover damages from the defendant railroad company alleged to have been sustained from a forest fire started by the railroad company, which had burned over plaintiff's property, and in an attempt to fix the date of the commencement of the fire, over objection, certain newspaper articles and certain telegrams sent by one of the defendant's train dispatchers to his superior officer, after having been shown to a witness to refresh his recollection as to the date, were admitted in evidence. In holding this was error, the Supreme Court of Minnesota said:

"We are unfamiliar with any rule rendering either of the newspaper articles competent to go to the jury under the circumstances disclosed. They were mere hearsay and should not have been admitted, and the same must be held with reference to the second telegram. The witness had no personal knowledge of the facts stated in this telegram and was merely reporting to the dispatcher what a section foreman told him. The transaction did not materially differ from such a communication by mail, and it could not be claimed that either the original letter or a copy thereof would be competent."

Salo v. Duluth & I. R. R. Co., 140 N. W. 188.

Letters written by third parties in another state to third parties in the state in which the prosecution is maintained, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.

Bedford v. Sate, 55 N. W. 263.

In the case last cited, the charge against the defendant was that of unlawfully, willfully and maliciously attempting to corrupt a material and important witness for the prosecution in a criminal case then pending. To quote from the opinion:

“A letter from the wife of plaintiff in error to the wife of Hezekiah Bedford, and also from the daughter to her mother, were offered and introduced in evidence against the objection of plaintiff in error. These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know.”

At the risk of repetition we again desire to respectfully call to the court's attention the extremely damaging statement contained in this telegram over the signature of the United States district attorney, addressed to the attorney general, to-wit, that the papers that he referred to *proved the age and birth of the defendant and plaintiff in error, Edward Phelan*. If such testimony as this were admissible, the Government might go a short step further, and with the same right introduce in evidence copies of all letters and

reports passing between the district attorney's office in Los Angeles and his superior officer, the attorney general, in Washington, discussing the case at bar and the likelihood or need of obtaining a conviction, and the evidence that the Government had against the defendant, and the views of the United States district attorney and the attorney general in connection with such evidence.

The situation is similar to that obtaining in the case of *Cook v. U. S.*, 34 L. Ed. 906, in which the plaintiff in error was convicted of murder, and an appeal was taken to the Supreme Court of the United States, and it developed that at the trial a witness who had formerly been attorney general of the state of Kansas, and who in that capacity had made a report to the governor of the state touching the death of the person for whose murder the defendant Cook was on trial, was called in rebuttal as a witness for the prosecution, and over objections of the defendant certain portions of this report, containing certain statements alleged to have been made by the defendants, were admitted in evidence and read to the jury. The court instructed the jury that the portions of the report were admitted in evidence to be considered by them as to whether or not such statements had been made to the witness, who now denied that they had been. The Supreme Court concluded their opinion in the case as follows:

“The jury were thus informed that this report, although merely hearsay, was substantive evidence upon the issue as to whether the defendants were present at and participated in the killing. The rep-

representatives of the Government in this court frankly conceded, as it was their duty to do, *that this action of the court below was so erroneous as to entitle the defendants to a reversal.*"

Cook v. U. S., *supra*.

We submit that, in the case at bar, likewise, under the most elementary principles of law, which need no citation of authorities for their support, the introduction of the telegram in question was error of such a prejudicial nature as to entitle plaintiff in error to a reversal of the judgment.

If this telegram was introduced by the Government for the purpose of supplying a foundation for the introduction of the pension affidavits, being Government's Exhibits 3 and 4, for the introduction of which the Government wholly without success endeavored to lay a foundation [Tr. pp. 113, 114, 96, 97], a mere perusal of the document shows conclusively, as outlined in the brief of plaintiff in error, pages 77 to 80, that it neither proved the existence or the execution of the pension affidavits in question, nor did it in any manner tend to show that the originals of these pension affidavits could not be produced.

If the document was introduced by the Government for the purpose of endeavoring to lay a foundation for the impeachment of the witness Mary Phelan, it wholly failed to serve such purpose, because it did not or could not, of its very nature, in any manner supply the Government's omission to relate to Mrs. Phelan the statements alleged to have been made to her which it was sought to impeach, or the time and place of the making

thereof, or to ask her whether or not she had made such statements; nor could the document in question in any manner supply the omission of the government to show Mrs. Phelan the original writing claimed to have been made by her, and concerning which it was sought to impeach her. As shown in brief of plaintiff in error, pages 76, 77, by the authorities there cited, such a foundation of necessity must have been laid in order to impeach the witness in question.

IV.

The Court Erred in Allowing to Be Introduced in Evidence and Read to the Jury a Letter From the Chief of the Department of Justice at Washington to the United States Attorney at Los Angeles.

Immediately after the introduction in evidence by the Government of the telegram hereinabove discussed, and while the same witness, Clara Taylor, was on the stand, over the objection of the defendant that the same was incompetent, irrelevant and immaterial [Tr. p. 118], the government introduced in evidence a letter from A. B. Bielaski, chief of the department of justice at Washington, to John R. O'Connor, United States attorney at Los Angeles, California. The letter was in words and figures as follows:

"Department of Justice, RLD-LP

Bureau of Investigation,

Washington, October 10, 1917.

"John R. O'Connor, Esquire, Assistant United States
Attorney, Los Angeles, California.

"Dear Sir:

"Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

"The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. BIELASKI,

Chief."

(Enclosures) RLD"

The same remarks are applicable to the introduction of this letter as have been made in connection with the telegram from the United States attorney to the attorney general, hereinabove discussed and referred to. This letter was presumably admitted in evidence as being an answer to the said telegram. The letter contained a statement by

the chief of the department of justice as to what the commissioner of pensions *considered* with reference to the sending to Los Angeles of certain original papers. The statement in question was: "The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well." Even had the commissioner of pensions himself undertaken to testify that he considered it impracticable to send such original papers, that would have been nothing more than his conclusion, and would have been incompetent for that purpose. As it was, we have here admitted in evidence a written statement by a third person of what the commissioner of pensions said to him he considered about the sending of these papers. This is unquestionably the purest hearsay.

Furthermore, as was said with reference to the telegram to which this letter was an answer, the letter does not in any way help to prove the existence or execution of the pension applications and affidavits referred to therein, nor does it supply any competent reason why the originals of these documents were not produced by the Government. The Bielaski letter contained this further damaging statement with reference to the documents enclosed: "I believe, however, that the certified copies will serve your purpose equally well."

We must respectfully urge and submit that the telegram from the United States attorney in Los Angeles to the attorney general, taken together with the letter from Bielaski in reply thereto, were necessarily bound to impress the jury, and did without a doubt impress

the jury with the conviction that the pension affidavits in question not only were properly executed in every way and that they had been executed by Mary Phelan, but that they were competent evidence and did actually prove the age and birth of the defendant and plaintiff in error, Phelan, and for these reasons were dangerously damaging and prejudicial to the plaintiff in error, and that their introduction by the Government was inexcusable on any theory and constitutes reversible error. The admission of both of these documents was assigned as error [Tr. pp. 170, 171, 172.]

V.

There Was No Showing on the Trial of This Action That the Defendant Was Not an Officer or an Enlisted Man of the Regular Army or the Navy or of the National Guard or of the Naval Militia While in the Service of the United States.

The indictment in this case, after charging the plaintiff was of the draft age on the date of registration prescribed by the Selective Service Act, and that he failed to register on that day, proceeds as follows:

“He, the said Edward H. Phelan, then and there not being an officer or an enlisted man in the regular army or the navy or the marine corps or the national guard or the naval militia in the service of the United States, or an officer in the reserve corps or an enlisted man in the enlisted reserve corps in active service.” [Tr. p. 7.]

It was necessary for the sufficiency of the indictment to bring the plaintiff in error within the above-quoted

provision, which is contained in section 5 of the Selective Service Law of May 18th, 1917. The indictment would not have charged an offense had it not negatived the exception quoted. It was incumbent upon the Government to prove as well as plead that the plaintiff in error was not in the excepted class. This was a material portion of the crime charged and should have been proved.

Shelp v. United States, 81 Fed. Rep. 694;
Johnson v. People (Colo.), 108 Am. Stat. Rep.
90;
State v. Booknight, 74 Am. Stat. Rep. 751;
State v. Abbey (Vt.), 67 Am. Dec. 654;
United States v. Cook, 21 L. Ed. 538;
People v. Miles, 9 Cal. App. 312;
2 Bishop's New Crim. Pr. (2nd Ed.), Sec. 636,
637, 639.

The correct doctrine with reference to pleading and proof of an exception in a criminal statute is contained in the case of *State v. Abbey*, *supra*:

"In saying that an exception must be negatived when made in the enacting clause, reference is not made to sections of the statute, as they are divided in the act; nor is it meant that, because the exceptions are contained in the section containing the enactment, it must for that reason be negatived. * * * The question is, whether the exception is so incorporated with, and becomes a part of, the enactment as to constitute a part of the definition or description of the offense. * * * 'It is the nature of the exception, and not its location,' which determines the question. * * * The same principle

should govern this class of cases which governs other classes, and the exceptions should be negatived only where they are descriptive of the offense, or define it; but where they afford matter of excuse merely, they are to be relied upon in defense. The question is one not only of pleading, but of evidence, and where the exceptions must be negatived in the indictment, the allegations must be proved by the prosecution, though the proof may involve a negative."

This doctrine is approved by the Supreme Court of the United States in the case of *United States v. Cook*, *supra*.

The question, then, is whether the provisions of the Selective Service Law providing that any person who was an officer or an enlisted man in the regular army or the navy, etc., need not register, is so incorporated with and such a vital part of the statute requiring registration as to form a part thereof. We submit that this question is not open to argument. The Selective Service Law specifies a certain portion of the male population of the United States that shall on a certain day present themselves for registration, and that part of the population of the United States that is already in the military or naval service of the United States is, by express enactment, excepted from the registration provisions. It seems clear that had the indictment failed to charge that the plaintiff in error was not in the military or naval service of the United States, it would have failed to state a public offense. If it was necessary to allege this in the indictment it was vitally necessary to prove that fact at the trial.

There is not a syllable of testimony in the records on that point. This is assigned as error [Tr. p. 185].

Points Discussed in Opinion.

The points above discussed are matters which, as heretofore stated, were not touched upon at all in this court's opinion affirming the judgment. There are two other alleged errors, however, which are partially touched upon in the opinion, but the real vice of which was not apparently in the mind of the court. The points referred to are:

A. THE ERROR IN ADMITTING IN EVIDENCE COPIES OF PENSION APPLICATIONS AND AFFIDAVITS ALLEGED TO HAVE BEEN MADE BY MARY PHELAN.

B. THE ERROR IN PERMITTING MONSIGNOR HARNETT TO TESTIFY AS TO THE BAPTISM OF THE PLAINTIFF IN ERROR AND THE DOCTRINE OF THE CATHOLIC CHURCH AS TO INFANT BAPTISM.

As to the first of these points the opinion of the court holds that these pension applications were properly admitted under certain sections of the federal statutes which deal only with the *certification and authentication* of these documents and not with *the proof of their existence or execution*. It was the total failure of the Government to show *the existence or execution* of these instruments that constituted the most vital error in their admission in evidence.

As to the testimony of Monsignor Harnett, this court in its opinion remarks that it tended to sustain the Government's contention. No mention is made of the fact that *there is no showing of knowledge of the doc-*

trine of the Catholic church as to infant baptism on the part of the parents of the plaintiff in error. The failure to make such a showing rendered the admission of this testimony grave error.

We will deal briefly with each of these points.

A.

There Was No Proof at All of the Existence or Execution of the Pension Applications and Affidavits Alleged to Have Been Made by Mary Phelan Which Were Introduced in Evidence as Government's Exhibits Nos. 3 and 4.

Plaintiff in error's assignment of errors Nos. 16 and 17, appearing in the transcript at pages 170 and 172, set out that the court erred in admitting in evidence over his objection United States Exhibits Nos. 3 and 4. Exhibit No. 3 was the deposition or affidavit of one Mary Phelan taken in connection with an application by said Mary Phelan for a pension, and this affidavit contains a statement as to the name and date of birth of an Eddie Henry Phelan and an Eddie Phelan, which agrees with the date of birth claimed for defendant and plaintiff in error by the Government. Exhibit No. 4 consists of affidavits made by one Mary Phelan in connection with three separate applications for a pension, which affidavits also contain a statement as to the date of birth of a son, Eddie Henry and Eddie, which agrees with the date claimed by the Government.

The brief of plaintiff in error (pages 62 and 77) dwelt at some length on the error in the introduction

of these affidavits, and besides contending that the existence and execution of them had not been proved (brief of plaintiff in error, pages 62, 65, 66), also made other contentions concerning the production of the certified copy of the record concerning these affidavits, claiming that the same had not been produced from the proper custody and that they did not bear the seal of the department of justice, and that their introduction did not in any way lay the necessary foundation for the impeachment of the witness Mary Phelan. In its opinion affirming the judgment this court states: "The objections to the introduction in evidence of the certified copies of the record of the pension bureau are sufficiently answered by the provisions of the statutes of the United States (Fed. Ann. Vol. 3, Sec. 882, p. 26, Fed. Ann. Supp. 1914, Sec. 1, 3, 4, p. 498)." The sections of the statutes referred to deal only with the certification and authentication of the documents in question and with their rank as evidence, that is to say, whether or not they are to be considered as primary or secondary evidence. Evidently, then, the most vital error in the introduction of these documents was not in the mind of the court at the time the opinion was rendered, and in view of the extreme seriousness of the charge against the plaintiff in error here, as hereinabove noted, we respectfully submit that

There Was No Proof at All of the Existence or Execution of These Pension Affidavits and Applications by the Witness Mary Phelan, to Justify Their Admission in Evidence to Impeach Her.

The only proof that was made or attempted to be made by the Government prior to the introduction of these documents was that the documents, alleged to be photographic copies of the originals, were shown to the witness Mary Phelan, and the witness was closely questioned several times by counsel for the Government and also by the court [Tr. pp. 96 and 97] as to whether or not the signature on the photographic copy was her signature, to which question, repeated several times in different forms, the witness, very naturally, in view of the fact that it was a purported photographic copy that was exhibited to her, stated that while it looked like her signature she could not say; that she did not know whether it was or not [Tr. p. 97]. The same method of proof, with the same results, was adopted by the Government in an endeavor to prove the execution and existence of the second set of affidavits, being Government Exhibit No. 4 [Tr. p. 114]. We particularly call the court's attention to what transpired when Exhibit No. 4 was shown to Mrs. Phelan, and the Government's attorney undertook to examine her concerning the same. Mrs. Phelan was shown Exhibit No. 4, the first page thereof, containing entries of births, and asked if it was not in her handwriting, to which she replied that she did not know, she could not say, that she did not remember writing that, and after several questions

along the same line counsel for plaintiff in error interposed an objection and the court said:

“I think, Mr. Lawson (counsel for Government), you will have to show me some authorities on the subject. You can ask her if she made certain statements in that document.”

“Q. By Mr. Lawson: I ask you again, Mrs. Phelan, if that is not your handwriting.

A. I don't remember. I can't say.

* * * The Court: Well, you may ask her if it is a photographic copy of her handwriting.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember.

* * * Q. By Mr. Lawson: Is that your handwriting?

A. I don't remember. I could not remember whether I wrote it.

The Court: That was not the question I gave you leave to ask.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I can't remember.” [Tr. p. 114.]

Thereupon, as the record shows [Tr. p. 115], there was a discussion between court and counsel as to admissibility of evidence, and a short recess was taken. When the court reconvened and the jury resumed their places Mrs. Phelan was not recalled to the witness stand by the Government, but instead the Government called a stenographer in the office of the United States at-

torney, Clara Taylor, and through her introduced a carbon copy of a telegram from the United States attorney to the attorney general in Washington, D. C., asking that papers be sent him "*proving age and birth Edward Phelan*," and a letter from the chief of the department of justice in reply thereto. There was not another scrap of evidence introduced tending in any way to prove the existence and execution by the witness Mary Phelan of the documents in question.

We particularly desire to call the court's attention to the fact that for the purpose of this argument we are assuming, without admitting it, that these photographic copies of the pension affidavits were *original evidence*, and we are not discussing any question now of any showing that should have been made to justify the introduction of secondary evidence; nevertheless, treating these documents as original evidence, there is not one syllable in the record to prove that these pension affidavits and applications ever existed or were ever executed by the witness Mary Phelan. The writings in question should have been proved in the same manner as any other written instrument. There was no evidence here given that the witness Mary Phelan had ever admitted the execution of these documents nor was her handwriting on the documents identified or proved in any manner, nor were the documents proved by anyone who saw the writing executed or by evidence of the genuineness of the handwriting or by a subscribing witness, as provided in California Code of Civil Procedure, Sec. 1940. The documents were not such as in any manner proved themselves. It is true

that section 1948 of the Code of Civil Procedure of the state of California provides that a writing acknowledged in the manner provided for the acknowledgment of a conveyance of real property is *prima facie* evidence of its execution. There is no acknowledgment whatever on these documents. The instruments are verified, but not acknowledged. Surely these photographic copies cannot have been entitled to be admitted in evidence under any other or different or less stringent rule than would have the original documents themselves had they been offered in court, and it certainly will not be contended that upon the mere production of the original documents, without a syllable of proof showing their identity, existence or execution, they could have been properly or at all admitted in evidence. The trial court by its suggestion to the attorney for the Government, during the examination of witness Mary Phelan, above set out, pointed the way to the proper method of proving these instruments; and that the Government itself recognized that no proof of them had been made is, we submit, shown by the fact of their calling the witness Clara Taylor and through her introducing, erroneously, as we contend, and as is herein set out, copies of a telegram and letter in reply thereto, dealing with the sending of the copies in question to the United States attorney at Los Angeles. Both of these exhibits contained a statement that one Eddie Henry or Eddie Phelan was born on July 13, 1886, the date contended for by the Government as the date of birth of plaintiff in error, and their admission was extremely damaging to him.

B.

The Vital Objection to Deducing Any Conclusions From the Testimony of Monsignor Harnett as to the Doctrine of the Catholic Church With Respect to Infant Baptism Is That the Parents of the Plaintiff in Error Were Not Shown to Have Had Knowledge of Such Doctrine, and Therefore to Draw Any Inferences From the Monsignor's Statement of It Would Be Pure Speculation.

It would appear from the opinion that the Circuit Court attached some importance to the statement of Monsignor Harnett as to the spiritual salvation of infants not baptized, and that it contributed to substantiating the Government's contention that the true date of the birth of plaintiff in error was July 13th, 1886. It is submitted, however, that this testimony should have no effect whatever, in view of the fact that nowhere in the evidence is it shown that either of the parents of the plaintiff in error, and particularly his mother, had any knowledge whatsoever of the doctrine of the Catholic church and its corollary, the prompt baptism of infants, and we are inclined to believe that respecting this matter the Circuit Court has not noticed our objection, as set forth in specification of error Nos. I and II. ' [Tr. pp. 158-160.]

The only attempt made to ascertain whether or not the practice was known to the parents was the question put by the United States attorney to the Monsignor: "Q. Was there a practice in your church that was known to those parents concerning when the child

should be baptized?" [Tr. p. 39.] And to this, upon exception overruled, the answer was, frankly: "I don't know." Absolutely no question whatever respecting this point was put to Mrs. Phelan.

It is difficult to see what bearing the doctrine of infant baptism could have on any of the issues involved, unless it could be affirmatively shown that the parents, or either of them, had at any rate some knowledge of such practice; only in which case it is possible to see how inference might be drawn that they would be prompted thereby to have the baptismal ceremony performed as soon as possible after the date of birth. Wanting such proof of knowledge, any inference would be the veriest guesswork, unsupported by precedent and condemned by the rules of evidence. The argument made and the authorities cited on point No. II of this petition referring to the refusal of the court to instruct the jury not to conjecture or guess at the age of the defendant from this testimony are referred to as being equally applicable here.

Error in Admitting Testimony as to Date of Baptism. Comments on *Whitcher v. McLaughlin*.

It is the contention of plaintiff in error that not only was Father Harnett's testimony as to the doctrine of the Catholic church inadmissible, but that error was also committed in permitting this witness to testify as to the *date of baptism* of plaintiff in error.

The Government contends this evidence was properly introduced, and cites as authority (brief of defendant in error, p. 7) the case of

Whitcher v. McLaughlin, 115 Mass. 167.

No other case is cited by the Government in support of its contention.

Whitcher v. McLaughlin was an action on an account, in which the defendant pleaded infancy. In support of his plea, the defendant at the trial was permitted to put in evidence the entry of his baptism to prove he was not of age. The entry was identified by the parish priest. Error in admitting this testimony was one of the points complained of by plaintiff, and in discussing the same, the court said:

“The plaintiff contends that it (the entry in the baptismal registry) was not admissible to prove the time of the defendant’s birth. But *assuming this to be so*, the exception cannot be maintained unless it affirmatively appears that the evidence was improperly used for that purpose. The date of the baptism, *with the aid of other evidence tending to fix the defendant’s age at the time*, would become material, and the entry was competent to prove that date. We must presume that such evidence was in the case. The bill of exceptions shows that the entry was offered in evidence ‘among other things’.”

It will thus be seen that the determination of Whitcher v. McLaughlin is not in conflict with any of the cases cited by plaintiff in error in his brief (brief of plaintiff in error, pp. 54 to 61); that on the contrary the court in this case assumed that the evidence of the entry in the baptismal registry was not competent to prove the time of defendant’s birth. The holding of this case, as we read it, is that, *provided there is other evidence to fix defendant’s age at the time of baptism*,

the baptismal entry would then become competent *to prove the date of baptism.*

The difference between the Whitcher case and this case is that in the former there was other evidence fixing defendant's age at the time of baptism, and the baptismal registry was received merely as ancillary to such other evidence. In this case there is no other evidence showing the defendant's age at the time of baptism, and the baptismal entry was used for the express purpose of showing such age. This, even under the doctrine of the Whitcher v. McLaughlin case, cannot be done.

For the reasons herein given, we respectfully pray that plaintiff in error be granted a rehearing herein.

We append herewith copy of the court's opinion and certificate of counsel that this application is, in his judgment, well founded and is not interposed for delay.

ISIDORE B. DOCKWEILER,

DOCKWEILER & MOTT,

Attorneys for Plaintiff in Error.

G. C. O'CONNELL,

Of Counsel.

APPENDIX.

United States Circuit Court of Appeals for the Ninth Circuit.

Edward H. Phelan, plaintiff in error, v. The United States of America, defendant in error. No. 3086.

Opinion U. S. Circuit Court of Appeals.

Upon writ of error to the United States District Court, for the Southern District of California, Southern Division.

Before Gilbert, Ross and Morrow, circuit judges.
Ross, *Circuit Judge*:

We see no merit in any of the contentions on behalf of the plaintiff in error. The indictment against him charged, among other things, that on the 5th day of June, 1917, he was over 21 years of age and had not then attained the age of 31 years, and that notwithstanding the fact that the said 5th day of June was the day appointed by proclamation of the president for the purpose, and that the said plaintiff in error did not come within any of the exceptions contained in the Act of Congress in pursuance of which the said proclamation was issued, to-wit, the act approved May 18, 1917, entitled "An act to authorize the president to increase temporarily the military establishment of the United States," the said plaintiff in error wilfully thereunder.

The record shows that the sole defense interposed by the plaintiff in error in the court below was based upon the contention that he was born March 13, 1886, and was therefore more than 31 years old on the 5th day of June, 1917.

The proof on the part of the Government given on the trial tended to show that he was in fact born July 13th, 1886, and was therefore not 31 years old June 5th, 1917.

The jury found that issue in favor of the Government, and accordingly returned a verdict of guilty, upon which verdict judgment was duly entered.

The testimony of the plaintiff in error, as well as that of his mother given on the trial, was to the effect that he was born March 13th, 1886; but even in that testimony both of them admitted that up to within about four years of the time of the trial the plaintiff in error was under the "impression" that his birthday was July 13th, 1886.

The Government offered, and there was admitted in evidence over the objection of the defendant, copies duly certified by the commissioner of pensions, of certain applications filed years before the giving of her testimony in the present case by the mother of the plaintiff in error, for a pension as the widow of the father of the plaintiff in error, who was a soldier in the Civil War, in which applications she expressly declared the plaintiff in error was born July 13th, 1886; and the Government also offered, and there was admitted in evidence, also over the objections of the defendant, a petition for a homestead filed by the mother of the plaintiff in error February 9th, 1892, in the Superior Court of Los Angeles county in the matter of the estate of her deceased husband, in which petition she stated, among other things, that at the time of the death of her husband, which occurred June 1, 1889,

that the plaintiff in error was born July 13th, 1886. And there was other testimony given on behalf of the Government of the same tendency—among which was that of Monsignor Harnett, of the Catholic church, who testified in substance that as priest he was called upon to and did baptize the plaintiff in error at the residence of his parents; that by the requirements of his church the priest is obliged to record the date of the baptism of infants, and did so in the instant case—the witness saying:

“I have the baptismal record of the year 1886 with me, and there is recorded in that book the baptismal record of the defendant, Edward Henry Phelan. I baptized the child, and after referring to the record can state the date of the baptism”—giving it as August 8th, 1886.

The witness was further permitted to testify over the objection and exception of the defendant, as follows:

“The teaching of the Catholic church with regard to the death or with regard to the salvation of infants who die without baptism is that no one, no child who is unbaptized and dies before it obtains the use of reason, can enter into the kingdom of heaven.”

We think that all of the testimony referred to, to which objection was taken, tended to sustain the contention of the Government that the true date of the birth of the plaintiff in error was July 13th, 1886, and accordingly that the objections were properly overruled.

The objections to the introduction in evidence of the certified copies of the records of the pension bureau are sufficiently answered by the provisions of the statutes of the United States (Fed. Stats. Ann., Vol. 3, Sec. 882, p. 26; Fed. Stats. Ann., Supp. 1914, Secs. 1, 3 and 4, p. 498).

Conceding the impropriety of the remarks of the United States attorney complained of, the error, if any, was, we think, sufficiently cured by the instructions of the court to the effect that the jury should "not consider the remarks of the United States attorney, coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded."

The judgment is affirmed.

(Endorsed): Opinion. Filed April 1, 1918. F. D. Monckton, clerk; by Paul P. O'Brien, deputy clerk.

I, Isidore B. Dockweiler, do hereby certify that I am an attorney-at-law, duly licensed to practice in all of the courts of the state of California and in the District Court of the United States for the Southern District of California, Southern Division, and in the United States Circuit Court of Appeals for the Ninth Circuit. That I am a member of the firm of Dockweiler & Mott, and I am one of counsel for Edward H. Phelan, the plaintiff in error in the within and above case. In my judgment the within petition for the rehearing made on behalf of Edward H. Phelan, the plaintiff in error, is well founded, and that such petition is not interposed for delay.

.....

United States
Circuit Court of Appeals
For the Ninth Circuit.

CIRO CONETTO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Divisions of the
United States District Court of the
Northern District of California,
First Division.

FILED

DEC 14 1917

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For the United States:

JOHN W. PRESTON, Esq., U. S. Attorney.

For the Defendant:

NATHAN C. COGHLAN, Esq., 68 Post St.,
San Francisco, California.

*In the Southern Division of the United States
District Court, for the Northern District of
California.*

CLERK'S OFFICE—No. 213.

UNITED STATES OF AMERICA

vs.

CIRO CONETTO.

Praeipce for Transcript of Record.

To the Clerk of Said Court:

Sir: Please make transcripts of the following
papers and orders on file herein:

Bill of Exceptions.

Petition for Writ of Error.

Writ of Error (Original).

Order Allowing Writ of Error.

Citation on Writ of Error (Original).

Assignment of Errors.

Order Extending Time to File Record and Docket
Case.

Minute Orders under dates of September 13th, 15th,
17th and 29th, all in 1917.

Order of Removal.

Bond on Writ of Error.

NATHAN C. COGHLAN,
Attorney for Defendant.

[Endorsed]: Filed Nov. 9, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [1*]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 17th day of September, 1917, at a regular term of this Court held in the city of San Francisco, State of California, the above-entitled cause came on regularly for hearing on the application of the United States of America, plaintiff, for an order removing the defendant herein from the said Northern District of California to the jurisdiction of the United States District Court for the Southern District of Florida, the United States appearing by Mrs. A. A. Adams, Assistant United States Attorney for the Northern District of California, and the defendant, *Ciro Conetto*, appearing in person and by *Nathan C. Coghlan*, his attorney.

*Page-number appearing at foot of page of original certified Transcript of Record.

AND BE IT FURTHER REMEMBERED that at said hearing there was introduced and received in evidence upon behalf of the plaintiff the commitment of the Hon. Francis Krull, United States Commissioner for the Northern District of California at San Francisco, together with the order of the said commissioner dated September 15, 1917, finding probable cause to believe that the offense complained of had been committed and that the defendant *Ciro Conetto* was guilty thereof, and ordering him committed to the custody of the United States Marshal to await the order of the Judges of the United States District Court for this district, and the evidence upon [2] which said commitment and order were based, which said commitment was and is in words and figures following, to wit:

Commitment.

“Before Francis Krull, United States Commissioner for the Northern District of California, at San Francisco.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

The President of the United States of America to the United States Marshal for the Northern District of California, and to the Keeper of the Jail of the City and County of San Francisco, State of California:

WHEREAS, *Ciro Conetto* has been examined by me, Francis Krull, a United States Commissioner for the Northern District of California, at San

Francisco, on the charging of having, on or about the 5th day of Dec. 1916, at the City of Jacksonville, and in the Southern District of Florida, in violation of Section 29, Clause D. Sub. 1, of the Bankruptcy Act of 1898, concealed from trustee in bankruptcy from the estate of *Ciro Conetto*, a bankrupt, certain property belonging to the estate of said bankrupt and said *Ciro Conetto* having fled from said Southern District of Florida into this judicial district; and there was found by me, the commissioner, probable cause to believe the said *Ciro Conetto* guilty as charged, and

WHEREAS, said *Ciro Conetto* has been required to furnish bail in the sum of One Thousand Dollars for his appearance before the District Court of the United States in and for the said district whence he fled, then and there to answer the aforesaid charge, which requisition he has failed to comply with; now, therefore

This is to command you, the said marshal, in the name and by the authority aforesaid, to commit the said *Ciro Conetto* to the custody of the keeper of the jail of the said City and County of San Francisco, State of California, and to command you the said keeper of said jail, to receive the said *Ciro Conetto* prisoner of [3] the United States of America, and him there safely keep to abide the order of the Judges of the District Court of the United States for this district.

WITNESS my hand and the seal this 15th day of Sept. 1917.

[Commissioner Seal] FRANCIS KRULL,
United States Commissioner as aforesaid."

And which said order was and is in words and figures following, to wit:

Order of U. S. Commissioner Holding Defendant to Answer.

“It appearing to me that the offense herein complained of has been committed and there being sufficient reason to believe the defendant *Ciro Conetto* guilty thereof, I order that he be held to answer the same; that he be admitted to bail in the sum of One Thousand (\$1000) Dollars for his appearance for trial upon said charge before the United States District Court for the Southern District of Florida upon the first day of the next regular term thereof, and that he be committed to the custody of the United States Marshal until such bail be given or he be otherwise legally discharged and to await the order of the Judges of the U. S. District Court for this district.

September 15, 1917.

FRANCIS KRULL,

United States Commissioner, Northern Dist. of California.”

AND BE IT FURTHER REMEMBERED that at said hearing there was introduced and received in evidence on behalf of plaintiff a certified copy of an indictment found and returned by the grand jurors of the United States of America in and for the Southern District of Florida, which said indictment was and is in words and figures following, to wit: [4]

Indictment.

In the District Court of the United States of America, in and for the Southern District of Florida.

Regular February Term There A. D. 1917.

Held at Tampa, Florida.

“The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the Southern District of Florida, upon their oaths present:

That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this Court, **Ciro Conetto** and **Alfonzo Conetto**, copartners trading and doing business as **C. Conetto & Brother**, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said **Ciro Conetto** and **Alfonzo Conetto**, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that **Maxwell Baxter** having been duly assigned as trustee in bankruptcy for the estate of the said **Ciro Conetto** and **Alfonzo Conetto**, trading as aforesaid, and that thereafter, on to wit, January 6, 1917, the said **Maxwell Baxter** so having been duly designated as trustee of said estate as aforesaid then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by **T. M. Shackelford, Jr.**, the said **T. M.**

Shackleford, Jr., then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and [5] qualification of said *Maxwell Baxter* as trustee in said bankruptcy proceedings, the said *Ciro Connetto* and *Alfonzo Connetto* unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Fifteen (15) cases of certain merchandise known and described as canned tomatoes the same then and there being tomatoes put up and sealed ready for sale in tin cans and the same then and there being packed or enclosed *on* wooden cases or boxes, the said tomatoes then and there bearing the brand and being known as *Castle Haven* tomatoes, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said *Ciro Connetto* and *Alfonzo Connetto*, and that thereafter, after the qualification of the said *Maxwell Baxter* as trustee by giving bond as aforesaid, the said *Ciro Connetto* and

Alfonzo Connetto have not, nor have either of them disclosed to the said Maxwell Baxter the possession by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of concealment by them, the said *Ciro Connetto* and *Alfonzo Connetto* of the said merchandise above described, to wit, fifteen (15) cases of Castle Haven tomatoes above described, the same in fact belonged to the bankrupt [6] estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, as they, the said *Ciro Connetto* and *Alfonzo Connetto*, then and there well knew, that no accounting has up to this date been made to the said Maxwell Baxter, trustee, of and for the said 15 cases of Castle Haven tomatoes above described; contrary to the form of the statute of the said United States in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid upon their oaths aforesaid, do further present:

That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this Court, *Ciro Connetto* and *Alfonzo Connetto*, copartners trading and doing business as *C. Connetto & Brother*, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as

aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Baxter having been duly designated as trustee in bankruptcy for the estate of the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, and that thereafter, on, to wit, January 6, 1917, the said Maxwell Baxter so having been duly designated as trustee of said estate as aforesaid then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by [7] T. M. Shackleford, Jr., the said T. M. Shackleford, Jr., then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and qualification of said Maxwell Baxter as trustee in said bankruptcy proceedings, the said Ciro Connetto and Alfonso Connetto unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit, Twenty-five (25) cases of certain merchandise known and described as canned tomatoes the same then and there being tomatoes put up and sealed ready for sale in tin cans and the same then and there being packed or enclosed *on* wooden

cases or boxes, the said tomatoes then and there bearing the brand and being known as Maryland Chief tomatoes, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said *Ciro Connetto* and *Alfonzo Connetto*, and that thereafter, after the qualification of the said *Maxwell Baxter* as trustee by giving bond as aforesaid the said *Ciro Connetto* and *Alfonzo Connetto* have not, nor have either of them disclosed to the said *Maxwell Baxter* the possession by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise above described, and did not and have not [8] turned over and delivered to the said *Maxwell Baxter*, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of the concealment by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise above described, to wit,

Twenty-five (25) cases of Maryland Chief Tomatoes, above described, the same in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, as they, the said *Ciro Connetto* and *Alfonzo Connetto*, then and there well knew, that no accounting has up to this date been made to the said *Maxwell Baxter*, trustee,

of and for the said 25 cases of Maryland Chief Tomatoes above described; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid upon their oaths aforesaid, do further present:

That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this court, Ciro Connetto and Alfonzo Connetto, copartners trading and doing business as C. Connetto & Brother, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Baxter having been [9] duly designated as trustee in bankruptcy for the estate of the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, and that thereafter, on, to wit, January 6, 1917, the said Maxwell Baxter so having been duly designated as trustee of said estate as aforesaid, then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by T. M. Shackelford, Jr., the said T. M. Shackelford, Jr., then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said

Ciro Connetto and Alfonzo Connetto, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and qualifications of said Maxwell Baxter as trustee in said bankruptcy proceedings, the said *Ciro Connetto* and *Alfonzo Connetto* unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Ten (10) cases of certain merchandise known and described as canned corn, the same then and there being corn put up and sealed ready for sale in tin cans and the same then and there being packed or enclosed in wooden cases or boxes, the said corn bearing the brand and being known as Extra Good Canned Corn, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said *Ciro* [10] *Connetto* and *Alfonzo Connetto*, and that thereafter, after the qualification of the said Maxwell Baxter as trustee by giving bond as aforesaid, the said *Ciro Connetto* and *Alfonzo Connetto* have not, nor have either of them, disclosed to the said Maxwell Baxter the possession by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise above described, and did not and

have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of the concealment by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise above described, to wit:

Ten (10) cases of Extra Good Canned Corn, the same in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, as they, the said *Ciro Connetto* and *Alfonzo Connetto*, then and there well knew, that no accounting has up to this day been made to the said Maxwell Baxter, trustee, of and for the said Ten (10) Cases of Extra Good Canned Corn above described; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this court [11] *Ciro Connetto* and *Alfonzo Connetto*, copartners trading and doing business as *C. Connetto & Brother*, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Baxter having

been duly designated as trustee in bankruptcy for the estate of the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and that thereafter, on, to wit, January 6, 1917, the said *Maxwell Baxter* so having been duly designated as trustee of said estate as aforesaid then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by *T. M. Shackleford, Jr.*, the said *T. M. Shackleford, Jr.*, then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and qualifications of said *Maxwell Baxter* as trustee in said bankruptcy proceedings, the said *Ciro Connetto* and *Alfonzo Connetto* unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Six (6) barrels of Granulated Sugar, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, [12] the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said *Ciro Connetto* and *Alfonzo Connetto*,

and that thereafter, after the qualification of the said Maxwell Baxter as trustee by giving bond as aforesaid, the said Ciro Connetto and Alfonzo Connetto have not, nor have either of them, disclosed to the said Maxwell Baxter the possession by them, the said Ciro Connetto and Alfonzo Connetto, of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of the concealment by them, the said Ciro Connetto and Alfonzo Connetto, of the said merchandise above described, to wit: Six (6) barrels of Granulated Sugar, the same in fact belonged to the bankrupt estate of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, as they the said Ciro Connetto and Alfonzo Connetto, then and there well knew that no accounting has up to this date been made to the said Maxwell Baxter, trustee of and for the said Six (6) Barrels of Granulated Sugar above described; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [13]

FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this court, Ciro Connetto and Alfonzo Connetto, copartners trading and doing business as C. Connetto & Brother, filed a voluntary petition in bankruptcy; that there-

after, on, to wit, December 6th, 1916, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that *Maxwell Baxter* having been duly designated as trustee in bankruptcy for the estate of the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and that thereafter, on, to wit, January 6, 1917, the said *Maxwell Baxter*, so having been duly designated as trustee of said estate as aforesaid, then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by *T. M. Shackleford, Jr.*, the said *T. M. Shackleford, Jr.*, then and there being a Referee in Bankruptcy for said district; that after the filing of said voluntary petition in bankruptcy and after the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and qualifications of said *Maxwell Baxter* as trustee in said bankruptcy proceedings, the said *Ciro Connetto* and *Alfonzo Connetto* unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, [14] the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Seven (7) sacks of certain merchandise known as and described as Cuban Rice, the same then and there being put up and packed in sacks

weighing approximately 300 pounds each, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said *Ciro Connetto* and *Alfonzo Connetto*, and that thereafter, after the qualification of the said *Maxwell Baxter* as trustee by giving bond as aforesaid, the said *Ciro Connetto* and *Alfonzo Connetto* have not, nor have either of them, disclosed to the said *Maxwell Baxter* the possession by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise above described, and did not and have not turned over and delivered to the said *Maxwell Baxter*, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of the concealment by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise, to wit, Seven (7) sacks of Cuban Rice above described, the same in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, as they, the said *Ciro Connetto* and *Alfonzo Connetto* then and there well knew, that no accounting has up to this date been made to the said *Maxwell Baxter*, trustee, of and for the said Seven (7) sacks of Cuban Rice above described; contrary to the form of [15] the statute in such case made

and provided and against the peace and dignity of the United States of America.

SIXTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this court, *Ciro Connetto* and *Alfonzo Connetto*, copartners trading and doing business as *C. Connetto & Brother*, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that *Maxwell Baxter* having been duly designated as trustee in bankruptcy for the estate of the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and that thereafter, on, to wit, January 6, 1917, the said *Maxwell Baxter* so having been duly designated as trustee of said estate as aforesaid then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by *T. M. Shackleford, Jr.*, the said *T. M. Shackleford, Jr.*, then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, had been duly [16] adjudicated a bankrupt, but before the appointment and qualification of said

Maxwell Baxter as trustee in said bankruptcy proceedings, the said *Ciro Connetto* and *Alfonzo Connetto* unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Twenty-five (25) sacks of a certain merchandise known and described as *American Rice*, the same then and there being put up and packed in sacks weighing approximately 100 pounds each, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said *Ciro Connetto* and *Alfonzo Connetto*, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said *Ciro Connetto* and *Alfonzo Connetto*, and that thereafter, after the qualification of the said Maxwell Baxter as trustee by giving bond as aforesaid, the said *Ciro Connetto* and *Alfonzo Connetto* have not, nor have either of them, disclosed to the said Maxwell Baxter the possession by them, the said *Ciro Connetto* and *Alfonzo Connetto* of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise above described, or accounted to him for the same; that at the time of the concealment by them, the said *Ciro Connetto* and *Alfonzo Connetto*, of the said merchandise, to wit: Twenty-five

(25) sacks of American Rice above described, the same in fact belonged to [17] the bankrupt estate of them, the said *Ciro Conetto* and *Alfonzo Conetto*, trading as aforesaid, as they, the said *Ciro Conetto* and *Alfonzo Conetto*, then and there well knew, that no accounting has up to this date been made to the said *Maxwell Baxter*, trustee, of and for the said 25 sacks of American Rice, above described; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

HERBERT S. PHILLIPS,
United States Attorney.

[Endorsed]: United States District Court, Southern District of Florida. United States of America vs. *Ciro Conetto*, *Alfonzo Conetto*. Indictment. Concealing Assets from Trustee in Bankruptcy. A true bill. *J. G. Anderson*, Foreman. Filed 21st day of February, A. D. 1917. *Edwin R. Williams*, Clerk. Bail, 1000.00. *Rhydon M. Call*, Judge. [18]

United States District Court, Southern District of Florida.

United States of America,
Southern District of Florida.

I, *Edwin R. Williams*, Clerk of the United States District Court, in and for the Southern District of Florida, and as such the legal custodian of the records and files of said court, do hereby certify the foregoing to be a true and correct copy of the original indictment, in the case of United States of America vs. *Ciro Conetto* and *Alfonzo Conetto*

which said indictment was returned in open court by a grand jury duly impaneled, sworn and charged to inquire within and for the Southern District of Florida, at a regular term of said court, convened and held at the City of Tampa, on February 21st, 1917, as the same now appears of record and on file in this office.

In witness whereof I hereunto set my hand and affix the official seal of this Court at Jacksonville, in said District, the 28th day of July, 1917.

[Seal]

EDWIN R. WILLIAMS,

Clerk U. S. Dist. Court, Southern Dist. of Florida.

[19]

AND BE IT FURTHER REMEMBERED, that it was then and there stipulated by and between counsel for the respective parties that said indictment constituted and was all of the evidence adduced by either party at the hearing before said commissioner and that said commitment and order were based solely and exclusively upon said copy of said indictment, except that the identity of the said *Ciro Conetto* was admitted.

AND BE IT FURTHER REMEMBERED that said commitment and order and said indictment are and constitute all the records and evidence adduced by either party upon the hearing before this Court.

AND BE IT FURTHER REMEMBERED that upon the introduction of said commitment, and order and said indictment the Government rested.

AND BE IT FURTHER REMEMBERED, that the defendant by his counsel, then and there objected to said motion for the removal of this defendant and

to the issuance of any order or warrant of removal upon the following grounds, to wit:

1. Because the above-entitled court did not have the jurisdiction to issue a warrant of removal in the above-entitled cause.

2. Because the said indictment on which said application for an order and warrant of removal was based did not set forth facts sufficient to constitute a public offense.

3. Because said indictment did not charge this defendant with an offense against the laws of the United States.

4. Because said indictment was in substance uncertain in the following respects:

(a) Because it could not be ascertained therefrom whether or not the said *Ciro Conetto* was or ever had been adjudicated a bankrupt.

(b) Because it could not be ascertained therefrom whether or not a trustee in bankruptcy was or ever had been appointed for any estate in bankruptcy of the said *Ciro Conetto*.

(c) Because it could not be ascertained therefrom whether or not the said *Ciro Conetto* while a bankrupt or after his discharge, concealed from his trustee in bankruptcy any of the property belonging to his estate in bankruptcy. [20]

(d) Because it could not be ascertained therefrom whether or not any of the alleged assets of the alleged bankrupt estate were ever concealed from the alleged trustee in bankruptcy.

5. That there was no reasonable or probable cause

to believe the defendant guilty as charged in said indictment.

6. That the allegations contained in said indictment were not sufficient in law to justify the granting and issuing of a warrant of removal.

7. That the first, second, third, fourth, fifth and sixth counts of said indictment, and each of them, were insufficient upon which to issue a warrant of removal and failed to charge the defendant *Ciro Conetto* with the commission of a public offense or an offense against the laws of the United States for the same reasons and in the same respects set forth and alleged as to the said indictment.

AND BE IT FURTHER REMEMBERED, that the Court, having heard the objections of the defendant and the arguments of counsel, ordered the said matter submitted for its decision.

AND BE IT FURTHER REMEMBERED, that thereafter, to wit, on the 29th day of September, 1917, the above-entitled court ordered that the objections of the defendant to the said motion for a warrant of removal be and the same were overruled and denied, and the Court granted the motion of the plaintiff herein for an order removing the defendant from the said Northern District of California to the said Southern District of Florida and ordered the issuance of a warrant of removal to which order and judgment the defendant then and there excepted, which exception was then and there allowed.

And thereupon the Court entered its judgment and issued a warrant of removal in words and figures as follows, to wit:

Warrant of Removal.

“United States of America,
Northern District of California,—ss.

The President of the United States of America: To
the Marshal of the United States, for the Northern
District of California, and his Deputies, or
any or either of [21] them, Greeting:

“WHEREAS, it has been made to appear that
Ciro Conetto has been charged before a United States
Commissioner, for the Northern District of California,
with a violation of Section 29, Clause ‘B,’
Sub. 1, of the Bankruptcy Act of 1898, for concealing
from the trustee in bankruptcy from the estate of
Ciro Conetto, a bankrupt, certain property belonging
to the estate of said bankrupt.

WHEREAS, the said United States Commissioner
has committed said *Ciro Conetto* to appear for trial
before the District Court of the United States, for
the Southern District of Florida and has fixed his
bail in the sum of One Thousand (\$1,000.00) Dollars
which he has been unable to furnish.

NOW, THEREFORE, YOU ARE HEREBY
COMMANDED to take the body of the said *Ciro Conetto*
and safely deliver him into the custody of the
Marshal of the United States, for the said Southern
District of Florida to be then and there dealt with
according to law. And do you then and there deliver
to the United States District Court for the Southern
District of Florida which has, by law, cognizance of
the offense, this WRIT, with your return endorsed
thereon.

Given under my hand this 29th day of September,
A. D. 1917.

WILLIAM C. VAN FLEET,
Judge of the United States District Court for the
Northern District of California.” [22]

And now in furtherance of justice and that right may be done the defendant tenders and presents the foregoing as his Bill of Exceptions in the above-entitled cause, and prays that the same may be settled and allowed, and that the same may be signed and certified to by the above-entitled court and become and be made a part of the record in the above-entitled cause.

NATHAN C. COGHLAN,
Attorney for Defendant.

Stipulation Re Bill of Exceptions.

It is hereby stipulated that the foregoing Bill of Exceptions, having been served and filed within the time allowed by law, is full, true and correct, and contains all the evidence introduced at the said hearing, and that the same may be settled and allowed by the Judge of the above-entitled court.

JNO. W. PRESTON,
United States Attorney.

NATHAN C. COGHLAN,
Attorney for Defendant.

Order Settling and Allowing Bill of Exceptions.

The foregoing Bill of Exceptions having been served, filed and presented for settlement within the time allowed by law, and being full, true and correct, and containing all the evidence introduced at the said

hearing, the same is hereby settled and allowed.
Dated this 9th day of November, 1917.

WM. C. VAN FLEET,
District Judge.

Due service of the within Bill of Exceptions is admitted this 26th day of October, 1917.

JNO. W. PRESTON,
United States Attorney.

[Endorsed]: Lodged Oct. 26, 1917. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. Filed Nov. 9, 1917, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [23]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the 13th day of September, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WM. C. VAN FLEET, Judge.

No. 213 (United States Commissioner Case).

UNITED STATES OF AMERICA

vs.

CIRO CONNETTO.

Minutes of Court—September 13, 1917—Order Continuing Hearing on Motion for Removal of Defendant.

In this case, after hearing Mrs. A. A. Adams, Assistant United States Attorney for the Northern District of California, N. C. Coghlan, Esq., appear-

ing as attorney for defendant, the Court ordered that this case be, and the same is hereby continued to September 15th, 1917, for hearing of the matter of the removal of defendant to the jurisdiction of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, to answer the charge of having on or about the 5th day of December, 1916, at the said City of Jacksonville, in the Southern District of Florida, violated Section 26, Clause B, Sub. 1, of the Bankruptcy Act of 1898, viz: concealing from the trustee in bankruptcy from the estate of Ciro Connetto, a bankrupt, certain property belonging to the said estate of said bankrupt.

[24]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the 15th day of September, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WM. C. VAN FLEET, Judge.

No. 213 (United States Commissioner Case).

UNITED STATES OF AMERICA

vs.

CIRO CONNETTO.

Minutes of Court—September 15, 1917—Order Continuing Hearing on Motion for Warrant of Removal.

This case came on regularly this day for hearing

of the application for a warrant of removal herein. Thereupon, after hearing attorneys for respective parties, the Court ordered that said matter be, and the same is hereby, continued to Monday, September 17th, 1917, at 2'clock P. M. [25]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 17th day of September, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WM. C. VAN FLEET, Judge.

No. 213 (United States Commissioner Case).

UNITED STATES OF AMERICA

vs.

CIRO CONNETTO.

**Minutes of Court—September 17, 1917—Order
Submitting Motion for Order of Removal.**

This case came on regularly this day for hearing on the motion for order removing defendant herein to the jurisdiction of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, to answer the charge of having on or about the 5th day of December, 1916, at the said City of Jacksonville, in the said Southern District of Florida, violated Section 26, Clause B, Sub. 1 of the Bankruptcy Act of 1898, viz: concealing from the trustee in bankruptcy from the estate of *Ciro Connetto*, a bankrupt, certain property belonging to the said

estate of said bankrupt. Thereupon, after hearing N. C. Coghlan, Esq., attorney for said defendant, and Mrs. A. A. Adams, Assistant United States Attorney for the Northern District of California, the Court ordered that said matter be, and the same is hereby, submitted. [26]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the 29th day of September, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WM. C. VAN FLEET, Judge.

No. 213 (United States Commissioner Case).

UNITED STATES OF AMERICA

vs.

CIRO CONNETTO.

**Minutes of Court—September 29, 1917—Order
for Warrant of Removal, etc.**

The Court this day ordered that the objection to removal of defendant to the jurisdiction of the United States District Court for the Southern District of Florida and the issuance of a Warrant of Removal overruled and that defendant herein be allowed an exception to said Order. Further ordered that a Warrant of Removal issue accordingly and that his bond for his appearance herein be, and the same is hereby fixed in the sum of One Thousand (1000) Dollars.

Further ordered, on motion of attorney for defendant, that execution be, and the same is hereby stayed for the period of five (5) days and that defendant remain at large on the bond heretofore given for his appearance herein. [27]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

Petition for Writ of Error.

To the Honorable WILLIAM W. MORROW, Judge
of the Circuit Court of the United States for the
Northern District of California.

Now comes *Ciro Conetto*, defendant herein, by *Nathan C. Coghlan*, his attorney, and says that on the 29th day of September, 1917, this Court entered order and judgment herein against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the manifest prejudice of this defendant, all of which will more fully appear from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained

of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

CIRO CONETTO,

Defendant.

NATHAN C. COGHLAN,

Attorney for Defendant.

[Endorsed]: Filed Oct. 11, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the District Court of the United States, in and for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

Assignment of Errors.

Ciro Conetto, defendant in the above-entitled cause, by Nathan C. Coghlan, his attorney, in connection with his petition for a Writ of Error, makes and files the following Assignment of Errors upon which he will rely in the prosecution of his Writ of Error in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made by this Honorable Court on the 29th day of September, 1917.

I.

That the Court erred in ordering United States marshal for the Northern District of California to

take the body of *Ciro Conetto* and delivering him into the custody of the marshal of the United States, for the Southern District of Florida.

II.

That the Court erred in holding that it had jurisdiction to issue a warrant of removal in the above-entitled cause.

III.

That the Court erred in holding that the indictment on which said application for the removal of defendant was based, set forth facts sufficient to constitute a public offense.

IV.

That the Court erred in holding that said indictment charged defendant with an offense against the laws of the United States. [29]

V.

That the Court erred in refusing to hold that the said indictment was in substance uncertain in the following respects:

1. Because it cannot be ascertained therefrom whether or not the said *Ciro Conetto* is or ever has been adjudicated a bankrupt.

2. Because it cannot be ascertained therefrom whether or not a trustee in bankruptcy is or ever has been appointed for any estate in bankruptcy of the said *Ciro Conetto*.

3. Because it cannot be ascertained therefrom whether or not the said *Ciro Conetto*, while a bankrupt, or after his discharge, concealed from his trustee in bankruptcy any of the property belonging to his estate in bankruptcy.

4. Because it cannot be ascertained therefrom whether or not any of the alleged assets of the alleged bankrupt estate were ever concealed from the alleged trustee in bankruptcy.

VI.

That the Court erred in holding that there was probable cause to believe defendant guilty as charged in said indictment.

VII.

That the Court erred in not discharging defendant from the custody of the United States Marshal for the Northern District of California.

VIII.

That the Court erred in its rulings as to the first, second, third, fourth, fifth and sixth counts of said indictment, and each of them, in the same respects as herein alleged as to said indictment. [30]

IX.

That the Court erred in holding that the allegations contained in said indictment were sufficient in law to justify the granting and issuing of a warrant of removal.

WHEREFORE, defendant in the above-entitled cause and plaintiff in error in the Writ of Error to the United States Circuit Court of Appeals, prays that the said order and judgment of the United States District Court, in and for the Northern District of California made and entered herein, in the office of the clerk of said court on the 29th day of September, 1917, ordering the removal of said *Ciro Conetto* be reversed, and that the said *Ciro Conetto* be discharged from custody.

Dated this 11 day of October, 1917.

CIRO CONETTO,

Defendant.

NATHAN C. COGHLAN,

Attorney for Defendant.

[Endorsed]: Filed Oct. 11, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

**Order Allowing Writ of Error and Settling Amount
of Supersedeas Bond.**

On motion of Nathan C. Coghlan, attorney for
plaintiff in error in the above-entitled cause,—

IT IS HEREBY ORDERED THAT a Writ of
Error to the United States Circuit Court of Appeals
for the Ninth Circuit from an order and judgment
heretofore made and entered herein be and the same
is hereby allowed, and that a certified transcript of
the records, proceedings and documents, and all of
the papers upon which said judgment and order were
based, be forthwith transmitted to the United States
Circuit Court of Appeals for the Ninth Circuit, in
the manner and time prescribed by law, and that
said defendant furnish bail on said Writ of Error

in the sum of \$1000, the same to operate as a super-sedeas bond.

Dated this 11th day of October, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Oct. 11, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [32]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

**Order Extending Time to File Record and Docket
Cause to and Including December 10, 1917.**

On motion of Nathan C. Coghlan, attorney for the defendant, and good cause therefore appearing it is ordered that the time for filing the record in the above-entitled cause and the time to docket said case in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 10th day of December, 1917.

Done in open court this 9th day of November, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 9, 1917, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [33]

Bond to Appear on Writ of Error.

UNITED STATES OF AMERICA.

Northern District of California,—ss.

BE IT REMEMBERED, That on this 11th day of October, in the year of our Lord one thousand nine hundred and seventeen before the undersigned, a United States Commissioner, duly appointed by the United States District Court for the Northern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared, *Ciro Conetto*, as principal, and National Surety Company, as surety, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of One Thousand (\$1000) Dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States of America.

The conditions of the above recognizance is such, that whereas, an indictment has been found by the grand jury of the United States for the Southern District of Florida and filed on the 21st day of February, A. D. 1917, in the United States District Court for the Southern District of Florida, charging the said *Ciro Conetto* with Violation Sec. 26 B, Subdivision One, Bankruptcy Act 1898, concealing assets from his trustee in bankruptcy, committed on or about the 5th day of December, A. D. 1916, to wit, at the District aforesaid, contrary to the form of the statute of the United States of America, in such case made and provided.

AND WHEREAS, the said *Ciro Conetto* has been required to give a recognizance, with sureties, in the sum of One Thousand (\$1000) Dollars for his appearance, pending the determination of Writ of [34] Error, to the United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, if the said *Ciro Conetto* shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtroom of said court, in the city of San Francisco and said Circuit Court of Appeals when required, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said courts without leave first obtained, and if he shall appear for judgment and render himself in execution thereof upon determination of said Writ of Error, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,

United States Commissioner for the Northern District of California, at San Francisco.

CIRO CONETTO.

[Seal]

NATIONAL SURETY COMPANY.

By C. T. HUGHES,
Its Attorney in Fact.

[Endorsed]: Filed Oct. 11, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [35]

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America, vs. *Ciro Conetto*, No. 213 (U. S. Commissioners' Cases), as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praeceptum for Transcript of Record," (copy of which is embodied in this transcript), and the instructions of the attorney for defendant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on Writ of Error is the sum of Fourteen Dollars and Eighty Cents (\$14.80), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Writ of Error (page 41), and the Original Writ of Error (page 37), with the Return of the said District Court to said Writ of Error attached thereto, (page 40).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 10th day of December, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [36]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

Writ of Error.

The President of the United States of America to
the Honorable Judges of the District Court
of the United States in and for the Northern
District of California, First Division, GREET-
ING:

Because in the record and proceedings, as also in
the rendition of the judgment and order, of a
cause which is in the said District Court before you,
or some of you, between United States of America,
plaintiff, and Ciro Conetto, defendant, manifest er-
ror has happened to the great damage of the said
Ciro Conetto, defendant, as appears by the petition
herein,

We, being willing that error, if any, should be
duly corrected, and full and speedy justice be done to
the parties aforesaid, in this behalf, do command
you, if judgment be given therein, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco in the State of California, together with this Writ so as to have the same at the said place in court on the 11th day of November, 1917, that the record and proceedings aforesaid being inspected, the said Circuit Court of [37] Appeals may cause further to have done therein to correct the errors, what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 13 day of October, 1917.

ATTEST my hand and seal of the District Court for the Northern District of California on the day and year last above written.

[Seal]

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

Allowed this 13th day of October, 1917.

WM. C. VAN FLEET,
Judge. [38]

[Endorsed]: No. 213. In the District Court of the United States, in and for the Northern District of California, First Division. United States of America, Plaintiff, vs. *Ciro Conetto*, Defendant. Writ of Error. Filed Oct. 13, 1917. W. B. Maling, Clerk. C. M. Taylor, Deputy Clerk. [39]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 13th day of October, A. D. 1917, duly lodged in the case in this court for the within-named defendant in error.

By the Court:

[Seal]

WALTER B. MALING,
Clerk, United States District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [40]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIRO CONETTO,

Defendant.

Citation on Writ of Error.

The President of the United States of America, to
the United States of America and JOHN W.
PRESTON, United States Attorney for the
Northern District of California:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, at the City of San Fran-
cisco in the State of California within thirty days
from the date hereof, pursuant to a Writ of Error
filed in the clerk's office of the Southern Division of
the District Court of the United States for the
Northern District of California, wherein *Ciro Con-
etto* is plaintiff in error and the United States of
America is defendant in error, to show cause, if any
there be, why judgment in the said Writ of Error
mentioned should not be corrected and speedy jus-
tice should not be done in that behalf.

Witness, the Hon. EDWARD D. WHITE, Chief
Justice of the United States Supreme Court, this
13th day of October, 1917.

WM. C. VAN FLEET,
Judge. [41]

Due service of the within Citation admitted this
13th day of October, 1917.

JOHN W. PRESTON,
United States Attorney.
C. G. H.

[Endorsed]: No. 213. In the District Court of the
United States, in and for the Northern District of

California, First Division. United States of America, Plaintiff, vs. Ciro Conetto, Defendant. Citation on Writ of Error. Filed Oct. 13, 1917. W. B. Maling, Clerk. C. M. Taylor, Deputy Clerk.

[Endorsed]: No. 3087. United States Circuit Court of Appeals for the Ninth Circuit. Ciro Conetto, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed December 10, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONETTO,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

NATHAN C. COGHLAN,

Attorney for Plaintiff in Error.

FILED
JUL 14 1918

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United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONETTO,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

Plaintiff in error and one Alfonso Conetto were indicted in the District Court of the United States of America, in and for the Southern District of Florida, on February 21st, 1917, for the violation of Section 29b (1) of the Bankruptcy Act of 1898. The plaintiff in error was thereafter arrested in the Northern District of California and, after a hearing before the Honorable Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, on the 15th day of September, 1917, was remanded to the custody of the United States Marshal for said Northern District of California to abide the order of the Judges

of the District Court of the United States for said District (Tr. pp. 3, 4). Thereafter on the 29th day of September, 1917, an order and warrant of removal was made and entered by the Honorable William C. Van Fleet, Judge of the said District Court, directing the said Marshal to deliver plaintiff in error into the custody of the Marshal of the United States for the Southern District of Florida.

At the hearing before the said Commissioner the Government introduced a certified copy of the indictment found and returned by the Grand Jurors of the United States of America, in and for the said Southern District of Florida (Tr. pp. 6-21) and, upon the hearing before the said District Court, it was stipulated that said indictment constituted all the evidence adduced before the said Commissioner and that the commitment and order of said Commissioner (Tr. pp. 3, 4, 5) were based solely and exclusively upon said copy of the indictment, except that the identity of the plaintiff in error was admitted (Tr. p. 21).

The said commitment, order and indictment also constituted all the records and evidence adduced upon the hearing before the said District Court (Tr. p. 21) and the order and warrant of removal are based solely and exclusively upon the said commitment, order and indictment. The said commitment and order being based entirely upon the indictment (except as to the identity of the plain-

tiff in error, which is conceded), this argument will be confined to a discussion of two questions:

(1) Where an indictment, which is the sole basis upon which a removal is sought, fails to charge an offense and should be quashed for uncertainty, the District Court has no jurisdiction to permit or to order the removal of a prisoner.

(2) The indictment in this case does not charge plaintiff in error with an offense against the United States and should be quashed for uncertainty.

The indictment contains six counts, which are identical in language, except as to the several descriptions of the merchandise alleged to have been concealed, and we will, therefore, confine the argument to the first count and refer to it for convenience as "the indictment." The indictment in full is set forth in the Transcript, pages 6 to 21. The first count thereof reads as follows:

"That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this Court, Ciro Connetto and Alfonzo Connetto, co-partners trading and doing business as C. Connetto & Brother, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Baxter having been duly assigned as trustee in bankruptcy for the estate of said

Ciro Connetto and Alfonzo Connetto, trading as aforesaid, and that thereafter, on to wit, January 6, 1917, the said Maxwell Baxter so having been duly designated as trustee of said estate as aforesaid then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by T. M. Shackelford, Jr., the said T. M. Shackelford, Jr., then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and qualification of said Maxwell Baxter as trustee in said bankruptcy proceedings, the said Ciro Connetto and Alfonzo Connetto unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Fifteen (15) cases of certain merchandise known and described as canned tomatoes the same then and there being tomatoes put up and sealed ready for sale in tin cans and the same then and there being packed or enclosed in wooden cases or boxes, the said tomatoes then and there bearing the brand and being known as Castle Haven tomatoes, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said Ciro Connetto and Alfonzo Connetto, and that

thereafter, after the qualification of the said Maxwell Baxter as trustee by giving bond as aforesaid, the said Ciro Connetto and Alfonzo Connetto have not, nor have either of them disclosed to the said Maxwell Baxter the possession by them, the said Ciro Connetto and Alfonzo Connetto, of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of concealment by them, the said Ciro Connetto and Alfonzo Connetto of the said merchandise above described, to wit, fifteen (15) cases of Castle Haven tomatoes above described, the same in fact belonged to the bankrupt estate of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid as they, the said Ciro Connetto and Alfonzo Connetto, then and there well knew, that no accounting has up to this date been made to the said Maxwell Baxter, trustee, of and for the said 15 cases of Castle Haven tomatoes above described; contrary to the form of the statute of the said United States in such case made and provided and against the peace and dignity of the United States of America."

Specifications of Error.

I.

That the Court erred in ordering the United States Marshal for the Northern District of California to take the body of Ciro Conetto and deliver him into the custody of the Marshal of the United States, for the Southern District of Florida.

II.

That the Court erred in holding that it had jurisdiction to issue a warrant of removal herein.

III.

That the Court erred in holding that the indictment, on which said application for the removal of the plaintiff in error was based, set forth facts sufficient to constitute a public offense.

IV.

That the Court erred in holding that there was probable cause to believe plaintiff in error guilty as charged in the indictment.

V.

That the Court erred in holding that the allegations contained in said indictment were sufficient in law to justify the granting and issuing of a warrant of removal.

VI.

That the Court erred in holding that said indictment charged plaintiff in error with an offense against the laws of the United States.

VII.

That the Court erred in refusing to hold that the said indictment was in substance uncertain in the following respects:

(a) Because it cannot be ascertained therefrom whether or not the plaintiff in error is or ever has been adjudicated a bankrupt.

(b) Because it cannot be ascertained therefrom whether or not a trustee in bankruptcy is or ever has been appointed for any estate in bankruptcy of the said *Ciro Conetto*.

(c) Because it cannot be ascertained therefrom whether or not the said *Ciro Conetto*, while a bankrupt, or after his discharge, concealed from his trustee in bankruptcy any of the property belonging to his estate in bankruptcy.

(d) Because it cannot be ascertained therefrom whether or not any of the alleged assets of the alleged bankrupt estate were ever concealed from the alleged trustee in bankruptcy.

VIII.

That the Court erred in its rulings as to the first, second, third, fourth, fifth and sixth counts of said indictment, and each of them, in the same respects herein alleged as to said indictment.

Brief of the Argument.

I.

Where an indictment, which is the sole basis upon which a removal is sought, fails to charge an offense and should be quashed for uncertainty, the

District Court has no jurisdiction to permit or to order the removal of a prisoner.

Section 1014, Rev. Stat.;

In re Buell, 3 Dill. 116, Fed. Cas. No. 2102;

In re Terrell, 51 Fed. 213;

U. S. v. Conners, 111 Fed. 734;

Stewart v. U. S., 119 Fed. 89;

Beavers v. Henkel, 194 U. S. 73, 83;

Tinsley v. Treat, 205 U. S. 20.

II.

The indictment in this case does not charge the plaintiff in error with an offense against the United States and should be quashed for uncertainty.

Sec. 29b (1) of Bankruptcy Act;

Sec. 1a (4) of Bankruptcy Act;

Sec. 1a (19) of Bankruptcy Act;

Sec. 5a of Bankruptcy Act;

In re Bertenshaw, 157 Fed. 363, 85 C. C. A.
61;

In re Hansley and Adams, 228 Fed. 564;

In re McMurtrey, 142 Fed. 853;

In re Mercur, 122 Fed. 384;

Field v. United States, 137 Fed. 6;

Meyers v. United States, 200 Fed. 822;

Johnson v. United States, 163 Fed. 30;

In re M'Crea, 161 Fed. 246.

The Argument.

I.

WHERE AN INDICTMENT, WHICH IS THE SOLE BASIS UPON WHICH A REMOVAL IS SOUGHT, FAILS TO CHARGE AN OFFENSE AND SHOULD BE QUASHED FOR UNCERTAINTY, THE DISTRICT COURT HAS NO JURISDICTION TO PERMIT OR TO ORDER THE REMOVAL OF A PRISONER.

In this connection we will consider Specifications of Error, Numbers 1, 2, 3, 4 and 5, and Assignment of Errors, Numbers 1, 2, 3, 6 and 9 (Tr. pp. 31, 32, 33).

The removal of a prisoner from one district within the United States to another district is governed by Section 1014 of the Revised Statutes, which provides:

“For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk’s office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is

committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This section has been construed in many cases, and it has been held universally that the act of a district judge in ordering the removal of the prisoner is not a ministerial act, but involves the exercise of a judicial discretion. It is the duty of the judge, therefore, to determine in each case that sufficient cause exists for the removal of the prisoner, and where, as in the case at bar, the finding of the commissioner that probable cause exists is based solely and entirely upon a copy of the indictment, it becomes the duty of the district judge, before issuing a warrant of removal, to inquire into the sufficiency of the indictment, and, if the indictment, fails to charge the prisoner with an offense against the United States or should be quashed for uncertainty, no warrant of removal should issue and the prisoner should be discharged.

The reason for this rule is ably set forth by Circuit Judge Dillon in the following language:

"It is argued that the question of the sufficiency of the indictment is for the Court in which it was found, and not for the district judge on such application. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves upon a high judicial officer of the government a useful and important duty. In a country of

such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such removal. Mere technical defenses to an indictment should not be regarded; but the district judge who should order the removal of a prisoner, when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed the offense not committed or triable in the district to which the removal is sought, would misconceive his duty, and fail to protect the liberty of the citizen."

In re Buell, 3 Dill. 116, Fed. Cas. No. 2102.

In re Terrell, 51 Fed. 213, the removal of a prisoner was sought upon an indictment found in the District Court of the United States for the District of Massachusetts. In discussing the provisions of Section 1014 of the Revised Statutes, the Court said:

"It is not disputed by the district attorney that it is not only the right, but the duty, of the district court, before ordering removal to look into the indictment, so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon habeas corpus, whether the petitioner is held under the warrant of removal issued by the district judge whose decision is thus reviewed, or under the warrant of the commissioner to await the

action of the district judge. * * * There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on habeas corpus, is satisfied, *from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it.* This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending." (Italics ours.)

In the case of *U. S. v. Connors*, 111 Fed. 734, the Government sought to remove a prisoner from the State of Oregon to the Northern District of California, a very short distance indeed in comparison with the distance in the case at bar, to wit, from the State of California to the State of Florida. In that case the *prisoner consented to the removal* but the Court refused to make the order and Bellinger, D. J., said: ..

"The petition for removal is not resisted by defendant, and the suggestion was made in the application that the order prayed for in the petition was agreeable to his wishes. But this can make no difference. There can be no order of removal upon consent of the party whose removal is sought, where the facts charged in the indictment do not constitute a crime."

Another case, in which the removal of a prisoner was sought and the question before the Court was the sufficiency of the indictment, is the case of *Stewart v. United States*, (C. C. A.) 119 Fed. 89, and the Court, holding that the indictment was bad in substance and that it should also be quashed for uncertainty, ordered the defendant discharged.

This same question has been considered by the United States Supreme Court and the decisions in that tribunal also sustain the plaintiff in error on this point. In discussing this question the learned Mr. Justice Brewer said:

“It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting Sec. 1014 Rev. Stat. (U. S. Comp. Stat. 1901, p. 716), which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. *In other words, the removal is made a judicial rather than a mere ministerial act.*” (Italics ours.)

Beavers v. Henkel, 194 U. S. 73, 83.

This language is quoted with approval in the case of *Tinsley v. Treat*, 205 U. S. 20, and Mr.

Chief Justice Fuller, in discussing the effect of an indictment in a removal proceeding, said:

“We regard that question as specifically presented in the present case, and we hold that the indictment cannot be treated as conclusive under Sec. 1014.”

II.

THE INDICTMENT DOES NOT CHARGE THE PLAINTIFF IN ERROR WITH AN OFFENSE AGAINST THE UNITED STATES AND SHOULD BE QUASHED FOR UNCERTAINTY.

The indictment attempts to charge the plaintiff in error with the crime of concealing property belonging to his estate in bankruptcy from his trustee in bankruptcy, in violation of the provisions of Section 29b (1) of the Bankruptcy Act of 1898, which provides that:

“A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy.”

(30 Stat. L. 554).

It is the contention of the plaintiff in error that the indictment does not allege that *he* was ever adjudicated a bankrupt or that a trustee was ever appointed for *his* estate in bankruptcy, but that the indictment attempts to allege that *C. Connetto & Brother, a co-partnership*, was adjudicated a bankrupt and that a trustee was appointed for *its*

estate in bankruptcy, and that property was concealed from *its* trustee. Before entering into a discussion of the allegations of the indictment, it may be well to ascertain the status of a partnership under the Bankruptcy Act.

THE PARTNERSHIP IS A LEGAL ENTITY, DISTINCT FROM THE INDIVIDUALS COMPOSING IT.

The word "bankrupt," as defined by the Act, "shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt." Sec. 1a (4).

" 'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, * * *." Sec. 1a (19).

Section 5a of the Bankruptcy Act provides that:

"A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

Under these provisions, the partnership is a "person," and may be adjudicated a bankrupt, irrespective of whether or not the individual members thereof are adjudicated bankrupts. The partnership may be insolvent or be adjudicated a bankrupt when one of the partners has died, or where one of the partners is an infant, or where one partner is insane, or where one of the partners is solvent, or where all of the individual partners

are solvent, in which cases it would be impossible to have one or more of the individual members adjudicated bankrupts.

The status of a partnership as a legal entity and the distinction between the *partnership* and the individual members thereof is clearly pointed out in an able and exhaustive opinion by Circuit Judge Sanborn in *re Bertenshaw*, 157 Fed. 363, 85 C. C. A. 61.

In *re Hansley and Adams*, 228 Fed. 564, Adams, one of the partners, filed a petition to have the partnership and himself declared bankrupts. The district judge made an order that "the said Hansley & Adams, a co-partnership, is hereby declared and adjudged a bankrupt accordingly."

Hansley later moved to vacate the above order and, denying the motion, Trippett, District Judge, said:

"This is not an adjudication that the members of the partnership are bankrupt.

"Hansley now moves the court to vacate the adjudication on the ground that there has been no order adjudicating H. A. Hansley and J. E. Adams bankrupts. The contention is made that the partnership cannot be adjudged bankrupt without, at the same time, adjudging the individual members of the partnership bankrupts.

"That statute provides that a partnership may be declared bankrupt. A partnership is an entity to that extent. The statute does not impose the condition that the partners shall be declared bankrupt at the same time as the partnership. It is plain that the partnership

may be declared a voluntary or involuntary bankrupt. There is no limitation in the statute in this regard. It is well settled that one partner may petition to have the partnership declared a voluntary bankrupt. * * * The language of the statute does not justify an inference that Congress meant that partnership could not be declared bankrupt without adjudication of the partners to be bankrupt."

In *re McMurtrey*, 142 Fed. 853, it was held that a partnership is insolvent and subject to adjudication as a bankrupt when the partnership property is insufficient to pay its debts, regardless of the individual property of the partners.

In *re Mercur*, 122 Fed. 384, the Court held that where members of the firm have been adjudicated bankrupts, but the *partnership has not*, the trustee appointed in the individual cases has no authority to interfere with the firm assets.

The indictment does not allege that *Ciro Connetto*, the plaintiff in error, has ever been adjudged a bankrupt, but attempts to allege that *C. Connetto & Brother, a co-partnership*, was adjudged a bankrupt; that a trustee was appointed for *its* estate, and that the property was concealed from *its* trustee. It must be evident that it is impossible for any person other than the *bankrupt* to commit the offense itself.

In the case of *Field v. United States*, 137 Fed. 6, the plaintiff in error was *not a bankrupt*, but was the vice-president of a bankrupt corporation. He was indicted and convicted under Sec. 29b.

After quoting Sec. 1, cl. 19, of the Bankruptcy Act, which defines "persons," the Court said:

"A careful reading of this clause, however, in connection with the terms of Section 29b, convinces me that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All, who are punishable under Section 29b, are persons who are or who have been bankrupts. Hence none of those whom the word "persons" is made to include under Section 1, cl. 19,—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless they are either bankrupts when they concealed the property, or have been such and have obtained their discharges before that time. *Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute.*" (Italics ours.)

The indictment does not attempt to allege that *Ciro Conetto as an individual* has ever been adjudicated a bankrupt, or that a trustee has ever been appointed for *his* estate in bankruptcy, or that the assets of *his* bankrupt estate were concealed. The indictment alleges that "Ciro Conetto and Alfonso Conetto, co-partners trading and doing business as C. Conetto & Brother, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said *Ciro Conetto and Alfonso Conetto*, trading as aforesaid, were duly adjudicated bankrupts * * *; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Bax-

ter having been duly designated as trustee in bankruptcy for the estate * * *"; and the indictment continues to refer to "*a bankrupt*," "estate in bankruptcy," always using the singular. (Tr. pp. 6, 7, 8.) Although the indictment is not altogether clear and should be held void for uncertainty, the inference, if any can be drawn, is that the *partnership*, and not the individual members thereof, was the bankrupt, Maxwell Baxter was *its* trustee, and the property referred to was the property of *its* bankrupt estate.

In re Meyers, 96 Fed. 408, two members of a firm had filed separate petitions in bankruptcy and had been adjudicated bankrupts. The partnership was not adjudicated a bankrupt and no application in that behalf was made. An application for discharge by the individual members of the partnership was denied on the ground that a trustee for the firm should be appointed to collect firm assets. The trustees for the individual members could only collect assets of the individual estates and neither trustee represented the partnership. In referring to Section 29b of the Bankruptcy Act the Court said:

"In individual proceedings like these, a concealment of firm assets would not fall within Section 29b, because firm assets do not belong to the individual estate; and this individual estate is all that either trustee in these proceedings represented."

In the case at bar Maxwell Baxter was the trustee of the bankrupt estate of *the partnership* and not

of the plaintiff in error. It would be impossible, therefore, under Section 29b, for the plaintiff in error to be guilty of concealing the assets of the bankrupt estate of *the partnership* from *its* trustee in bankruptcy. In order to directly charge an offense under this section the indictment must contain allegations averring that the plaintiff in error, while *he* was a bankrupt or after his discharge, concealed property of *his bankrupt estate* from *his* trustee in bankruptcy.

**THE INDICTMENT DOES NOT CHARGE A CONCEALMENT
FROM THE TRUSTEE.**

It is alleged in the indictment that

“before the appointment the qualification of said Maxwell Baxter as trustee * * * the said *Ciro Connetto* and *Alfonzo Connetto* unlawfully and fraudulently did conceal certain property” (Tr. p. 7).

There is no allegation that the said Conetto *continued* to conceal said property or that they ever *concealed said property from said trustee*. There is an allegation that,

“after the qualification of said Maxwell Baxter as trustee * * *, the said *Ciro Connetto* and *Alfonzo Connetto* have not * * * disclosed to the said Maxwell Baxter the possession * * * of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter * * * the said merchandise as above described, or accounted to him for the same.”

The specific allegation is that the *concealment took place before* the appointment of the trustee.

While it may be conceded that where property is concealed prior to the appointment of a trustee, and the concealment continues after such appointment, it is a concealment from the trustee, nevertheless one of the essential elements of the offense is the *concealment from the trustee*, and the failure to directly and specifically allege a concealment from the trustee renders the indictment invalid. The Act does not make it a crime to *conceal property prior* to the appointment of a trustee, or to *fail to disclose* the possession of property, or to *fail to account* to the trustee, or to fail to *turn over and deliver* property to the trustee. It is necessary that there be a *concealment*.

Assuming that the Government should prove everything charged in the indictment in this connection, to wit:

- (1) the concealment prior to the appointment of a trustee, and
- (2) the failure to disclose the possession of the property to the trustee, and
- (3) the failure to account to the trustee, and
- (4) the failure to turn over and deliver the property to the trustee,

the bankrupt would not be guilty of *concealing* property from the trustee. The property in question may have come into the possession of the

trustee immediately after his appointment or even prior thereto. These elements may or may not be included in a concealment. The bankrupt might fail to *account* and to *deliver* and to *turn over* and to *disclose* the property to the trustee, and yet the property could be in the actual possession of the trustee, or, negligently or otherwise, in the possession of a third person. A similar situation existed in the case of *Meyer v. United States*, 200 Fed. 822. The concealment occurred prior to the appointment of a trustee, but in that case after alleging the concealment *prior* to the appointment of a trustee, the indictment contained an allegation that the defendant "did then and there continue to conceal * * * from his said trustee." But no such allegation is contained in this indictment.

"The offense is not making a misrepresentation at a given time and place; it is the continuous concealment of the property from the trustee during the whole course of the proceedings and beyond."

Johnson v. United States, 163 Fed. 30.

There is but one more defect in the indictment to which the Court's attention should be directed, i. e., that there is no allegation as to the value of the property referred to or that it is of any value whatsoever. In *re M'Crea*, 161 Fed. 246, it was held that a bankrupt is not guilty of making a false oath when he omits from his sworn schedule securities which are absolutely worthless, and it must follow that it would be no crime to conceal property which had no value.

In conclusion, we submit that the indictment fails to allege that the plaintiff in error has ever been adjudicated a bankrupt, or that there has ever been a concealment from the trustee, or that plaintiff in error has ever concealed *while a bankrupt*, or after his discharge any property belonging to *his* bankrupt estate from *his* trustee in bankruptcy.

It is respectfully submitted that the order and warrant of removal should be set aside and the plaintiff in error discharged.

Dated, San Francisco,
February 11, 1918.

NATHAN C. COGHLAN,
Attorney for Plaintiff in Error.

No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONNETTO,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

JOHN W. PRESTON,

United States Attorney,

ANNETTE ABBOTT ADAMS,

Asst. United States Attorney,

Attorneys for Defendant in Error.

Filed this.....day of May, 1918.

FRANK B. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONNETTO,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

Plaintiff in Error has appealed from the order of the District Court of the United States in and for the Northern District of California made on the 15th day of September, 1917, ordering the removal of Ciro Connetto to the Southern District of Florida, to answer to an indictment charging him jointly with one Alfonzo Connetto with a violation of section 29b (1) of the Bankruptcy Act of 1898. The said order of removal was based upon a certified copy of the indictment (the identity of the defendant Ciro Connetto being admitted), and the sole question raised by this appeal is the sufficiency of the indictment to justify the order of removal based thereon. Counsel for plaintiff in error has advanced two propositions as follows:

1. That where an indictment, which is the sole basis upon which a removal is sought, fails to charge an offense and should be quashed for uncertainty, the District Court has no jurisdiction to permit or to order the removal of a prisoner.

2. The indictment does not charge the plaintiff in error with an offense against the United States and should be quashed for uncertainty.

In reply to the first of these propositions we submit that mere uncertainty in an indictment will not justify a refusal to order a removal thereon, as doubt about an indictment should not be resolved against it in such cases.

In *re Belknap*, 96 Fed. 614 the Court said:

“Doubts should not be solved against the indictment in such cases. On the contrary, it seems to me that they should be solved in favor of the removal of the accused, for the reason that the court in which the indictment is pending is entirely competent to determine all questions involved, and can be implicitly relied upon to determine them according to the law and the justice of the case.”

Mere technical defects that might be raised on special demurrer, cannot be considered on an application to remove.

U. S. vs. Horner, 44 Fed. 677;

Beavers vs. Henkel, 194 U. S. 73;

Green vs. Henkel, 183 U. S. 249, 260.

It must therefore be conceded that unless the indictment in this case fails entirely to state an offense under the laws of the United States, the order of removal must be affirmed. This brings us to a con-

sideration of the second proposition of counsel for appellant that no offense is stated.

The indictment in this case charges in substance (Tr. p. 6) that **Ciro Connetto** and **Alfonzo Connetto**, co-partners trading and doing business as **C. Connetto & Brother**, filed a voluntary petition in bankruptcy, and that thereafter the said co-partnership was adjudicated bankrupt and that one **Maxwell Baxter** was duly assigned as trustee for the estate of the said co-partnership; that after the filing of the said petition, and after the said co-partnership had been duly adjudicated a bankrupt, but before the appointment of the said trustee, the said **Ciro Connetto** and **Alfonzo Connetto** unlawfully and fraudulently concealed certain property belonging to the estate of the bankrupt co-partnership, and that after the qualification of the said trustee neither **Ciro Connetto** nor **Alfonzo Connetto** disclosed to the said trustee their possession of the concealed property, and that neither of them turned over or delivered to him the said property or accounted to him for the same; there is no allegation that either **Ciro Connetto** or **Alfonzo Connetto** as an individual was adjudicated bankrupt, and the sole question here is whether a partner who conceals the assets of a bankrupt co-partnership is guilty of a violation of the said Sec. 29b of the Bankruptcy Act which provides that:

“A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and

fraudulently (1) concealed while a bankrupt, or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy.”

Counsel for appellant contend that a partnership is a distinct legal entity within the provisions of the Bankruptcy Act, and that as such it might violate section 29b (1) above, but that the individuals making up such co-partnership may conceal the property of the partnership without rendering themselves subject to the punishment provided by the law.

Counsel rely on *Field vs. U. S.* 137 Fed. 6, decided in the Circuit Court of Appeals for the Eighth Circuit on April 7th, 1905, wherein it was held that the vice-president of a bankrupt corporation, not himself a bankrupt, was not guilty of a violation of section 29b (1) of the bankruptcy act, when he concealed the property of the corporation estate from its trustee in bankruptcy.

The gradual trend of the decisions of the courts since the Field case was decided has been away from this holding. In *Cohen v. U. S.* 157 Fed. 651, decided in the Circuit Court of Appeals for the Second Circuit on November 7th, 1907, it was held that an indictment will lie against individuals for conspiring to cause a corporation to commit the offense made punishable by Section 29b (1) of the Bankruptcy Act.

In *U. S. vs. Young & Holland Co.*, 170 Fed. 110, decided in the Circuit Court of Rhode Island, May 5th, 1909, it was held that “although section 29b re-

quires as a principal offender a bankrupt, it is applicable not only to a bankrupt, but also to all persons who unite with the bankrupt in the act which is made an offense by the statute."

Attention is directed in this opinion, to Chap. 1, Sec. 1, subdivision 19 of the Act which provides: "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." The opinion continues: "The term 'participants in the forbidden acts' seems an appropriate expression designed to cover persons who join with a bankrupt in the commission of the offenses created by Chap. 4, Sec. 29, and framed in view of the rule that those who are present, aiding, commanding, or abetting, are deemed principals." The court then calls attention to section 332 Criminal Code of the United States, enacted March 4, 1909, and subsequent to the decisions in the Field and Cohen cases, and which reads: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal," saying: "This section apparently is declaratory of the existing rule."

In *Kaufman v. U. S.* 212 Fed. 613, it was held by the Circuit Court of Appeals for the Second Circuit that one may be guilty of aiding and abetting a bankrupt corporation in the concealment of its assets, the defendant having been indicted as a principal under section 332 of the Criminal Code.

In *U. S. vs. Freed*, 179 Fed. 236, decided in the Circuit Court for the Southern District of New York on April 23rd, 1910, the court said in overruling a demurrer and denying motion to quash an indictment charging Freed with causing the bankrupt corporation of which he was president to conceal its property from its trustee: "The crime of concealing assets could be committed by a corporation, and Freed could be indicted for the offense if he participated in its commission. *Cohen v. U. S.* 157, Fed. 651; *U. S. v. Young & Holland Co.*, 170 Fed. 110. Those were cases of conspiracy; but if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard *Field vs. U. S.* 137 Fed. 6, as binding after *Cohen v. U. S.* supra."

The most recent case on this subject is *Wolf v. U. S.* 238 Fed. 902, decided in the Circuit Court of Appeals for the Fourth Circuit on November 16, 1916. In this case two brothers, who were, respectively, the president and secretary-treasurer of a bankrupt corporation, were convicted of concealing the property of the corporation in violation of section 29b of the

Bankruptcy Act. The validity of the indictments was attacked on the theory advanced in the instant case, that the crime of concealing property, as defined by the above section, can be committed only by a bankrupt; and as neither of the brothers was bankrupt as an individual, they were immune from prosecution. The Court said:

“The contention is not without merit or the support of judicial opinion. *United States v. Lake* (D. C.) 129 Fed. 499; *Field v. United States*, 137 Fed. 6, 69 C. C. A. 568. The Supreme Court also, in *United States v. Rabinowich*, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211, said that the question ‘is at least doubtful’, and refrained from deciding it. The contrary view is held in *United States v. Young & Holland Co.* (C. C.) 170 Fed. 110, where the subject is fully discussed and a number of decisions cited. See, also *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113; *United States v. Freed* (C. C.) 179 Fed. 236; *Roukous v. U. S.* 195 Fed. 353, 115 C. C. A. 255; *Kaufman v. United States* 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466; and the opinion of the learned district judge overruling the demurrers in this case. We are better satisfied with the reasoning of these later cases, and therefore disposed to follow them until the question is otherwise decided by the court of last resort. Besides, we think the indictments should be sustained, under the authorities just cited, on the counts charging the defendants with aiding and abetting the concealment of the bankrupt’s property.”

From the foregoing authorities it is apparent that the members of a partnership may be charged with

a violation of section 29b (1) of the Bankruptcy Act, and that the indictment in the present case is valid.

Counsel for appellant have raised an additional objection to the indictment in this case, to wit, that it does not charge a concealment of the property in question from the trustee after his appointment and qualification. They concede that if the concealment, though effected before the appointment of the trustee, continue after his appointment there is a concealment within the terms of the statute. But that the language here used, that "before the appointment and qualification of said Maxwell Baxter as trustee * * * the said Ciro Connetto and Alfonzo Connetto unlawfully and fraudulently did conceal certain property * * * and after the qualification of said Maxwell Baxter as trustee * * * the said Ciro Connetto and Alfonzo Connetto have not, nor has either of them disclosed to the said Maxwell Baxter the possession by them * * * of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee and aforesaid, the said merchandise * * * or accounted to him for the same * * * and that no accounting has up to this date been made to the said Maxwell Baxter", they contend is insufficient to charge a continuing concealment.

We believe this contention to be without merit; though more apt language may have been found to express a continuing concealment, in the absence of a

special demurrer, this defect, if such it be, does not justify a reversal of the order of removal.

As to the contention of counsel for plaintiff in error that as the indictment fails to allege the value of the property concealed and is therefor insufficient, we submit that where as here, the value of the property does not constitute an element of the offense, no allegation of value is necessary; furthermore, that the property is sufficiently described to justify an inference that it has value, and if it has none, that is a matter of defense and not an essential element of the offense necessary to be set forth in an indictment under section 29b (1) of the Bankruptcy Act.

Respectfully submitted,

United States Attorney,

Asst. United States Attorney,

Attorneys for Defendant in Error.

No. 3087

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CIRO CONETTO,	}
VS.	
THE UNITED STATES OF AMERICA,	
<i>Plaintiff in Error,</i>	
<i>Defendant in Error.</i>	

PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFF IN ERROR.

NATHAN C. COGHLAN,
Foxcroft Building, San Francisco,
Attorney for Plaintiff in Error
and Petitioner.

HYMAN LEVIN,
Foxcroft Building, San Francisco,
of Counsel.

FILED
APR 10 1910

No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONETTO,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Plaintiff in error respectfully petitions this Honorable Court for a rehearing of the above entitled cause, and in so doing desires to call the Court's attention to the fact that the opinion affirming the Order of the District Court was rendered on May 6th, 1918, at which time the period within which the plaintiff in error might file a reply brief, pursuant

to an order of this Court made on March 4th, 1918, had not expired.

The opening brief for plaintiff in error was filed on February 14th, 1918. The cause was regularly on the calendar for argument for March 5th, 1918. On March 4th, 1918, the Assistant United States Attorney announced in open Court that no brief had been filed upon behalf of the Government; that she was not ready to argue the case and requested that the case be submitted upon briefs. The Court thereupon made its order submitting the case upon briefs to be thereafter filed, granting the Government thirty days within which to file its brief and the plaintiff in error thirty days thereafter to reply. The Government, upon stipulation and order, secured a thirty day extension of said time and served and filed its brief on May 1st, 1918, leaving the plaintiff in error until June 1st, 1918, within which to file his reply. Notwithstanding this state of the record, the Court, without any intimation to counsel for plaintiff in error, rendered its opinion on May 6th last. This situation rendered the filing of a reply brief a work of supererogation and it has been suggested that a petition for rehearing might be filed rather than to set aside the opinion rendered and permit the filing of a reply brief. We call these facts to the Court's attention because we believe that had the opportunity to file a reply brief been accorded us, the Court would not have been led into the erroneous interpretation of the decisions referred to in the brief for defendant in error.

The removal of plaintiff in error from the Northern District of California to the Southern District of Florida is sought solely upon an indictment charging him and one Alfonso Conetto with a direct violation of section 29b (1) of the Bankruptcy Act, and plaintiff in error has objected to such removal on the ground that the indictment does not charge the commission of an offense against the United States. To use the language of Circuit Judge Gilbert,

“the objections to the indictment are, in brief, first, that it does not appear therefrom that the plaintiff in error has ever been adjudged a bankrupt, and that not having been adjudged a bankrupt, he is incapable of committing the offense for which he is indicted, and, second, that it does not appear from the indictment that at any time since the appointment of the trustee the plaintiff in error has concealed from the trustee any of the property belonging to the estate in bankruptcy”.

The Court's statement of the grounds of our objections is accurate, but we respectfully submit that neither the “decided weight of authority” nor “the weight of reason” support the Court's answer to these objections.

We believe that it will be conceded that the objections urged against this indictment are not “mere technical defects that might be raised on special demurrer”, but that these objections raise the question as to whether or not the indictment states an offense and upon this question we are content to rely upon the authorities cited in our open-

ing brief, pages 9 to 14. The case of *Beavers v. Henkel*, 194 U. S. 73, 83, from which we quoted on page 13 of our opening brief is also cited by the defendant in error on page 2 of its brief, so that there seems to be no difference between the Court and counsel for either side as to the proper rule in this respect.

We therefore address ourselves to a consideration of the points and authorities cited in the opinion of the Court and in the Government's brief, and we respectfully submit that a consideration of those cases will show not only that they are no authority for the Government's contention, but that they absolutely support the position of the plaintiff in error.

**PRESENT OR PAST BANKRUPTCY IS AN INDISPENSABLE
ELEMENT OF THE OFFENSE DENOUNCED BY SEC-
TION 29b (1) OF THE BANKRUPTCY ACT.**

Section 29b (1) of the Bankruptcy Act of 1898 provides that:

“A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed, *while a bankrupt*, or after *his* discharge, from *his* trustee any of the property belonging to his estate in bankruptcy.” (Italics ours.)

(30 Stat. L., 554.)

As suggested by the Court, our position is that the *substantive offense* created by this section can

only be committed by the bankrupt. We concede that the *individual members* of a bankrupt partnership or the *officers* of a bankrupt corporation, or any other person, can be guilty of the offense of *conspiring* to violate section 29b (1), or of *aiding and abetting*, under section 332 of the Criminal Code, the commission of said offense, but we insist that, in view of the plain language of the section and in view of all the cases construing this section, no person, *other than the bankrupt himself*, can be guilty of a *direct violation of this section*. As we will hereafter point out, this is the position of all the cases cited not only by plaintiff in error, but by the defendant in error and the Court as well. This would also seem to be the position taken by the United States District Attorney for the Southern District of Florida, who evidently drew the indictment here in question. That official in a very recent communication to counsel for plaintiff in error informs us that a subsequent indictment upon the same facts has been returned against plaintiff in error and his brother charging them with a "*conspiracy to violate the Bankruptcy Act.*"

We are also in thorough accord with the statement of the Court that "a partnership is a 'person' under the provisions of Chap. 1, Sec. 1 of the Bankruptcy Act", and it follows, as pointed out in our opening brief, pages 15-20, that the partnership is not only a *person* within the meaning of the Act but that it is a distinct *legal entity* separate and apart from the individuals compos-

ing it. Under the Bankruptcy Act, a partnership is a legal entity the same as a corporation, and the co-partners are different and separate *persons* just as the officers of a corporation are different and separate *persons* from the corporation itself.

The contention of plaintiff in error is very clearly and ably set forth in the case of *Field v. U. S.*, 137 Fed. 6. The opinion in that case was written by Judge Sanborn of the Circuit Court of Appeals for the Eighth Circuit and the case has been cited in most of the decisions construing section 29b, and we therefore quote the case in full:

“SANBORN, Circuit Judge. The plaintiff in error, who was not a bankrupt but who was a vice president and one of the directors of the Brown-Rollosson Company, a corporation which was a bankrupt, was indicted, a demurrer to the indictment was overruled, and he was convicted under section 29b of the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3433), of the offense of having knowingly and fraudulently concealed property which belonged to the estate of the corporation in bankruptcy from its trustee. Section 29b reads:

“‘A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy’.

“Neither the offense nor the punishment here described exists under the common law. They are the creatures of the act of Congress. In the absence of that act, no one could be legally

punished by imprisonment for having concealed property from his trustee in bankruptcy. In the presence of the act, therefore, no one can be lawfully punished by imprisonment for this concealment who is not by the terms of the statute subject to this punishment. The act specifically designates the persons liable to the punishment which it prescribes. *They are those who commit the offense denounced while they are bankrupts or after they have received their discharges in bankruptcy.* Under a familiar rule, this specification by the statute of those who are bankrupts, and those who have been bankrupts, as the persons liable to the punishment, *necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offense it denounces.* As the plaintiff in error was not and never had been a bankrupt, it is difficult to perceive how he could have been guilty of the offense of having concealed *while a bankrupt*, or after his discharge, from his trustee, any of his estate in bankruptcy.

“The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the bankruptcy law (30 Stat. 544 U. S. Comp. St. 1901, p. 3419) broadens the meaning of section 29b so that it includes the officers of a bankrupt corporation, who conceal the property of its estate in bankruptcy from its trustee, in the class subject to the punishment it prescribes. That clause reads in this way:

“‘Persons’ shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations.

“A careful reading of this clause, however, in connection with the terms of section 29b, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29b are *persons who are or who have been bankrupts*. Hence none of those whom the word ‘persons’ is made to include, under section 1, cl. 19—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless *they are either bankrupts when they conceal the property*, or have been such and have obtained their discharges before that time. *Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute*. Since the plaintiff in error was not a bankrupt when he was charged with concealing the property of the corporation, since he had never been a bankrupt and had not been discharged in bankruptcy, and since he had neither estate in bankruptcy nor trustee therein, he could not have concealed while a bankrupt, or after discharge, any of the property belonging to his estate in bankruptcy, from his trustee, and he was not amenable to the punishment prescribed by subsection 29b.

“The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its trustee is clearly within the mischief of this subsection, and therefore within its true interpretation, is unworthy of serious consideration. A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act which is not clearly an offense by the express will of the legislative department of the government must not be

made so after its commission by a broad construction adopted by the judiciary. The definition of the offense and the classification of the offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it, by construction, to a class of persons who are excluded from its effect by its terms, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces. *U. S. v. Wiltberger*, 5 Wheat. 96, 5 L. Ed. 37; *U. S. v. Clayton*, Fed. Cas. No. 14, 814; *In re McDonough* (D. C.) 49 Fed. 360; *U. S. v. Lake* (D. C.) 129 Fed. 499.

“The judgment below must be reversed, and the case must be remanded to the District Court with instructions to sustain the demurrer to the indictment and to discharge the plaintiff in error, and it is so ordered”.

The *Field Case* is clearly distinguished in the case of *Cohen et al. v. United States*, (C. C. A.) 157 Fed. 651. In this case the defendants were convicted under section 5440 of the *Revised Statutes of a Conspiracy* to violate section 29b. The Court very clearly distinguished between the offense charged, to wit, a conspiracy to violate section 29b (1), and a direct violation of the section, the Court saying:

“The defendants’ first contention is that, as no one of them was the bankrupt, no one of them could have violated this provision of the act, and that, if they could not have committed the principal offense, they could not conspire to commit it. In support of this contention they cite the cases of *Field v. United States*, 137 Fed. 6, 69 C. C. A. 568, and *United States v. Lake*, (D. C.) 129 Fed. 499. In the *Field*

case the Circuit Court of Appeals for the Eighth Circuit held that an officer of a bankrupt corporation was not liable to punishment under section 29b of the bankruptcy law for having fraudulently concealed the property of a corporation from its trustee—*that the present or past bankruptcy of the person accused was an indispensable element of the offense*. In the Lake Case the District Court for the Eastern District of Arkansas held that this section of the bankruptcy act must be strictly construed, and does not include officers of a corporation declared a bankrupt. The defendants also cite *United States v. Britton*, 108 U. S. 192, 2 Sup. Ct. 525, 27 L. Ed. 703, which held that where an act, if committed, would not amount to a crime under some law of the United States, an agreement to perpetrate it could not be punished under the conspiracy section. We are not called upon to dispute the legal principles laid down in these decisions. The difficulty with them in the present case is that they are not applicable. *The defendants are not charged with concealing assets as officers of a bankrupt corporation. They are not charged with conspiring that the officers of a bankrupt corporation should conceal its assets. They are charged with conspiring that a bankrupt corporation should conceal its assets*”. (Italics ours.)

In the case of *United States v. Young & Holland Co. et al.*, 170 Fed. 111, the defendants, including a corporation, were indicted under *section 5440 for conspiracy* to violate section 29b c. 4 of the Bankruptcy Act. A careful reading of that case will show that the language quoted from District Judge Brown’s opinion (Government’s brief, pages 4-5), when read in connection with the en-

tire opinion, does not have the meaning contended for by counsel for the Government. That case was a conspiracy case and the rule laid down in *Cohen v. United States*, supra, is approved and followed. In fact the Court remarks that "the indictment is apparently framed in view of the decision in *Cohen v. United States*", the only defense being that the corporation itself was named as one of the conspirators, whereas in the *Cohen Case* the corporation was not indicted. In view of the facts of that case and the remark of the Court that "the principal argument is directed to the point that a corporation cannot be guilty of the offense created by section 29b," it must be apparent that any remarks of the Court, tending in the slightest degree, to support the Government's contention are mere *dicta*, but as heretofore pointed out the case not only follows the rule laid down in the *Cohen Case*, but even the *dicta* can be construed to mean nothing more than that *persons other than the bankrupt may be charged*, not with the direct violation of section 29b, but only *with conspiracy or with aiding and abetting*.

The next case cited by counsel for the Government and also cited in the opinion of the Court, is the case of *United States v. Freed*, 179 Fed. 237.

This case like the *Holland Case*, supra, was decided in the Circuit Court. An extract from the opinion of District Judge Hand is set forth on page 6 of the Government's brief as follows:

“The crime of concealing assets could be committed by a corporation, and Freed could be indicted for the offense if he participated in its commission. *Cohen v. U. S.* 157, Fed 651; *U. S. v. Young & Holland Co.*, 170 Fed. 110. Those were cases of conspiracy; but if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard *Field v. U. S.* 137 Fed. 6, as binding after *Cohen v. U. S. supra*”.

If the remarks of Judge Hand can be considered as anything but *dicta*, we respectfully submit that they are not in accord with the decisions of the Circuit Court of Appeals referred to therein. It will be noted that in the *Freed Case* the defendants were not charged with conspiracy. The statement that

“if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished”,

is rather indefinite but if this language is to be understood as holding that an officer of a corporation, who can be guilty of a conspiracy to violate section 29b, can be guilty of the direct offense if the conspiracy is accomplished, then we respectfully submit that the same is not in accord with the *Cohen Case*, *supra*, and the subsequent cases in which it is cited, and this decision of District Judge Hand can have no weight. Furthermore, the remark that the *Field Case*, *supra*, is not binding, after the *Cohen Case*, *supra*, is wholly unjustified in view of the language of Circuit Judge Noyes in the *Cohen*

Case, quoted above with reference to the rule laid down in the *Field Case*.

This Honorable Court also cites in its opinion the case of *Roukous v. United States* (C. C. A.) 195 Fed. 353. This case flatly supports the contention of plaintiff in error. The same indictment and question in this case was considered in *United States v. Young & Holland Co. et al.*, 170 Fed. 110, which we have already discussed. As disclosed by that decision the defendants, *including the corporation* were indicted under section 5440 of the Revised Statutes for conspiracy to violate section 29b of the Bankruptcy Act. The contention of the defendants was that the corporation could not commit an offense and therefore the defendants could not conspire with the corporation to commit the offense, but the Court held otherwise—that the corporation could commit the offense although

“the penalty under section 29b of that statute is limited to imprisonment, which, of course, is an impossible penalty as applied to a corporation”.

The Court, referring to the *Field Case* and the *Cohen Case*, *supra*, said:

“*Field v. United States*, 137 Fed. 6, 69 C. C. A. 568, decided by the Circuit Court of Appeals for the Eighth Circuit, is not in point. *Cohen v. United States*, 157 Fed. 651; 85 C. C. A. 113, decided by the Circuit Court of Appeals for the Second Circuit is otherwise. Indeed, the indictment in the present case seems to have been drawn from what appears in that

decision almost verbatim. Following our practice with reference to prior decisions by the Circuit Courts of Appeals for other circuits, we yield to the determination in *Cohen v. United States*."

In the case of *Kaufman v. United States*, (C. C. A.) 212 Fed. 613, the defendant was charged, under section 332 of the Criminal Code, with *having aided and abetted* a bankrupt corporation to conceal assets in violation of section 29b and the Court held, in line with the other cases, that while the defendant, *not being the bankrupt, could not be guilty of the direct offense, he could be guilty under section 332 of the Criminal Code*. In this connection the Court said:

"It may be conceded that defendant could not be convicted under section 29b of the Bankruptcy Act. That section applies only to one who has 'knowingly or fraudulently concealed while a bankrupt or after his discharge.' *As the defendant is not alleged ever to have been a bankrupt the section is without application to him*. It was held in *Field v. United States*, 137 Fed. 6, 69 C. C. A. 568, that the present or past bankruptcy of the person accused was an indispensable element of the offense created by that section. The defendant, however, is mistaken in supposing that the principle announced in the Field Case is so far applicable to his case as to require this court to set aside his conviction. He loses sight of the fact that *his own conviction is not under section 29b of the Bankruptcy Act which was under discussion in the Field Case, but is under section 332 of the Criminal Code*". (Italics ours.)

Counsel for the Government quoted extensively (Government's brief, page 7) from the case of *Wolf v. United States*, 238 Fed. 902.

We respectfully submit that the authorities cited in support of the Court's apparent ruling in that case do not justify the inference which counsel for the defendant in error attempt to draw. It must also be noted that there is no direct statement of the rule, but merely a citation of authorities, apparently in conflict, but, as heretofore pointed out, really not in conflict. Furthermore, the remarks of the Court in this connection were not necessary to the decision, as is evidenced by the concluding sentence of the quotation, to wit.

"besides, we think the indictments should be sustained under the authorities just cited on the counts charging the defendants with aiding and abetting the concealment of the bankrupt property".

No fault can be found with this statement. It is wholly consistent with the argument advanced by plaintiff in error.

The last case cited (*Wolf v. United States*) as well as the opinion in the case at bar refer to the case of *United States v. Rabinowich*, 238 U. S. 86. In that case three partners, together with certain others, were indicted under section 37 of the criminal code for *conspiracy to violate section 29b* of the Bankruptcy Act. The conspiracy and overt acts were alleged to have taken place more than a year before the finding of the indictment. The

question before the Court was as to whether or not the offense in question was an offense arising under section 29 and therefore governed by section 29d, providing that the indictment must be filed within one year after the commission of the offense, or whether the offense charged was a different offense, under section 37 Criminal Code, and therefore governed by section 1044 of the Revised Statutes as amended (Comp. Stats. 1913 section 1708) providing that the indictment might be filed at any time within three years. The Court held that the crime of conspiracy was a separate and different offense from the offense denounced by section 29b. While there is no direct statement to that effect, we respectfully submit that the language of the Court strongly intimates that the rule contended for by plaintiff in error is correct and the Court cites the *Field Case*, supra, and the entire trend of the decision holding that conspiracy is a different offense from the direct violation of section 29b is in perfect accord with our contention in the case at bar. Mr. Justice Pitney, in delivering the opinion of the Court, plainly intimates that, in view of the *Field Case*, supra, there is no doubt but that "present or past bankruptcy is an attribute of every person who may commit the offense" denounced by section 29b of the Bankruptcy Act, and we quote the following from the opinion of the Court:

"It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in sec-

tion 29b (1) of the bankruptcy act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such. Counsel for defendant in error refers to section 1, subdivision 19, of the act, which gives the following definition: “(19) ‘Persons’ (87) shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations”. But the circuit court of appeals for the eighth circuit has held that this does not broaden the interpretation of section 29b (1) and that *present or past bankruptcy is an attribute of every person who may commit the offense therein denounced*. *Field v. United States*, 69 C. C. A. 568, 137 Fed. 6. And see *Kaufman v. United States*, 129 C. C. A. 149, 212 Fed. 613, 617.

But, *if* there be doubt about this we are not now called upon to solve it”. (Italics ours.)

It is obvious that if the rule laid down in the *Field Case* clearly states the law, then the contention of plaintiff in error must be sustained. Furthermore, it must be apparent that those cases, in so far as they even intimate that persons, other than the bankrupt, can be guilty of a direct violation of 29b of the Bankruptcy Act are founded upon the erroneous conclusion that the *Cohen Case* overrules the *Field Case*. But *nowhere* can there be found any direct statement of such a holding aside from the remark of Judge Hand in the case of *United States v. Freed*, 179 Fed. 236, and in

view of the numerous decisions of the Circuit Court of Appeals above cited and of the statement of Mr. Justice Pitney in the case of *United States v. Rabinowich*, supra, that “if there be doubt about this”, there can be no doubt but that the contention of plaintiff in error must be sustained.

**THE INDICTMENT DOES NOT CHARGE A CONCEALMENT
FROM THE TRUSTEE.**

The direct allegation of the indictment is that the concealment took place before the appointment of the trustee. As stated in the *Field Case* the section in question clearly states that the property must be concealed from the trustee in bankruptcy. There might be a conspiracy to conceal property from the trustee in bankruptcy, and the overt act constituting the concealment might take place before the appointment of the trustee, but in an indictment charging a direct violation of section 29b, it must be directly alleged that the property was concealed from the trustee. The language used in this indictment is, “that *before* the appointment and qualification of said Maxwell Baxter as trustee * * * the said Ciro Conetto and Alfonso Conetto unlawfully and fraudulently did conceal” certain property. There is no allegation that the defendants *continued to conceal* said property or that they ever *concealed said property from said trustee*. The allegations of the indictment, that

“after the qualification of said Maxwell Baxter as trustee * * * the said Ciro Conetto and Alfonso Conetto have not, nor has either of

them disclosed to the said Maxwell Baxter the possession by them * * * of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise * * * or accounted to him for the same * * * and that no accounting has up to this date been made to the said Maxwell Baxter",

are clearly insufficient to charge a concealment from the trustee. Counsel for defendant in error concede that "more apt language may have been found to express a continuing concealment" (Government's brief, p. 8) and this Honorable Court in its opinion says,

"that although concealment began before the appointment of the trustee and *was therefore at that time no offense*, it continued after the appointment of the trustee". (Italics ours.)

We submit that there is nothing in the indictment to support the conclusion that the concealment "continued after the appointment of the trustee" nor is there anything in the indictment to sustain the conclusion that

"the concealment is alleged to have consisted in the failure of the accused to deliver the property to the trustee, or to account for the same, or to disclose their possession thereof, and thereby concealment from the trustee was charged."

In fact there is no direct averment in the indictment that the property was ever in the *possession of the defendants* at any time *after the appointment of the trustee*, the specific allegation being

that the property was concealed *before* the appointment of the trustee.

The Court in its opinion herein cites the case of *Warren v. United States* (C. C. A.) 199 Fed. 753, and we believe that the opinion in that case conclusively establishes the contention of plaintiff in error here. In that case the defendant was adjudged a bankrupt on November 18th, 1908. On December 9th, 1908, a trustee was appointed and qualified. The indictment was found December 18th, 1909, more than twelve months after the filing of the petition and schedules and the adjudication, and more than twelve months after the appointment of the trustee. The indictment alleged that the defendant "on or about the 10th day of January, 1909, and continuously thereafter * * * knowingly, unlawfully and fraudulently concealed" from the trustee certain assets. The evidence showed that the *acts of concealment* took place more than twelve months prior to the filing of the indictment and the defendant claimed that the prosecution was barred by section 29d of the Bankruptcy Act which provides that the indictment must be filed within one year after the commission of the offense. The Government contended that as long as the bankrupt "fails to notify the trustee of the whereabouts of the property, the concealment continues, and there is no statute of limitations to prevent the prosecution". In other words, that the "mere silence and passivity of the defendant after the alleged concealment makes the

crime a continuing one". But the Court held otherwise and we submit that in the case at bar the language of the indictment does no more than to allege a "mere silence and passivity" on the part of the defendants, and that in view of the Court's opinion in the *Warren Case* the indictment is insufficient because it fails to allege *a concealment from the trustee*.

Counsel for the Government in their brief cite no cases upon this point but this Honorable Court in its opinion, in addition to the *Warren Case*, supra, also cites the case of *Kaufman v. United States*, 212 Fed. 613 and the case of *Cohen v. United States* 157 Fed 651.

In the *Kaufman Case*, supra, the indictment charged the Daisy Shirt Company with having *concealed its assets from its duly qualified trustee in bankruptcy*, and further charged that the defendant,

"under the circumstances aforesaid did knowingly and fraudulently cause, procure, aid and abet the Daisy Shirt Company * * * to conceal * * * from William P. Myhan, the duly qualified trustee in bankruptcy of the said Daisy Shirt Company, the aforesaid sums of money and the aforesaid property".

This language clearly alleges that the property was *concealed from the trustee*, not that there was a mere passive failure to disclose property, but that there was an active and positive *concealment from the trustee* which is not true in the case at bar. In this behalf Circuit Judge Rogers said:

“The offense with which the defendant is charged is that he *aided and abetted* the Daisy Shirt Company *while the said company was a bankrupt* knowingly and fraudulently *to conceal from the duly qualified trustee* property belonging to the estate in bankruptcy. *The concealment must be a concealment from the trustee.* In re Adams (D. C.) 171 Fed. 599. In the case at bar the funds were taken and the concealment began before the appointment of the trustee. But if the concealment which began before the appointment of the trustee continued after the appointment was made, and there was evidence in this case showing that it did, it constituted concealment from him. This we decided in the Cohen Case, *supra*”. (Italics ours.)

The last case cited by the Court is the case of *Cohen v. United States*, 157 Fed. 651. The indictment in that case alleged a conspiracy to violate section 29b and we submit that the indictment in that case is no precedent for the Court’s ruling in the case at bar, as must be evident from the following quotation from the Court’s opinion:

“It is true that it charges the removal and concealment of certain property before the appointment of a trustee; but it further alleges that a trustee was subsequently appointed, and that the property was never turned over to him, but *was concealed from him* by the procurement of defendant Simpson with the knowledge, consent, and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to consider whether there is an omission in the bankruptcy law in respect of the disposition of property in contemplation of bankruptcy. If a

bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment, he violates the bankruptcy act, and a conspiracy that he shall do so violates the conspiracy statute". (Italics ours.)

In preparing this petition we have referred to and analyzed every case cited by counsel for the defendant in error in their brief and every case cited in the opinion of this Honorable Court in its opinion, and we earnestly believe that each and every authority, with the possible exception of the *dicta* of District Judge Hand in the *Freed Case*, supports the position of plaintiff in error that the indictment herein is fatally defective for the reasons above set forth, to wit, that the plaintiff in error is not alleged to have been *adjudged a bankrupt* and therefore could not be guilty of the direct offense named in section 29b of the Bankruptcy Act, and, second because it is not alleged that the property referred to in the indictment was ever *concealed from the trustee*. And even the one apparent dissent (the *Freed Case*) attempting to set aside the rule of the Circuit Court of Appeals in the *Field Case* is nullified by subsequent decisions of the Circuit Court of Appeals and particularly by the reference to the *Field Case* in the opinion of Mr. Justice Pitney in the case of *United States v. Rabinowich*. The cases herein quoted clearly point out that the proper procedure in such a case as the one at bar is to charge the defendant either with *conspiracy under section 37 of the Criminal Code*,

or *with aiding or abetting under section 332 of the Criminal Code, and that no person, other than the bankrupt, can be charged directly under section 29b.*

It is respectfully submitted that the opinion of this Honorable Court, is in conflict with the authorities construing this section, and we earnestly pray that a rehearing may be granted and the judgment reversed.

Dated, San Francisco,

June 3, 1918.

NATHAN C. COGHLAN,
*Attorney for Plaintiff in Error
and Petitioner.*

HYMAN LEVIN,
of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,

June 3, 1918.

NATHAN C. COGHLAN,
*Counsel for Plaintiff in Error
and Petitioner.*

United States
Circuit Court of Appeals 6
For the Ninth Circuit.

CHEW HOY QUONG, as Petitioner for and on Be-
half of His Wife, QUOK SHEE,
Appellant,
VS.

EDWARD WHITE, Commissioner of Immigration
at the Port of San Francisco, California,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED
DEC 26 1917
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHEW HOY QUONG, as Petitioner for and on Be-
half of His Wife, QUOK SHEE,
Appellant,
vs.

EDWARD WHITE, Commissioner of Immigration
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Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For the Petitioner and Appellant:

DION R. HOLM, Esq., 602 California St., San
Francisco, California.

For the Respondent and Appellee:

JOHN W. PRESTON, Esq., U. S. Attorney.

*In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, First Division.*

No. 16,290.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of his Wife, QUOK SHEE.

Praecipe for Transcript of Record.

To the Clerk of the said Court:

Sir: Please issue certified copies of the following
pleadings:

1. Petition for Writ of Habeas Corpus, with two
pages of Exhibit "A," and amendment to
petition for Writ of Habeas Corpus, without
the exhibits.
2. Order to Show Cause.
3. Return.
4. Traverse.
5. Order Sustaining Return and Denying Petition.
6. Notice of Appeal.
7. Petition for Appeal.
8. Order Allowing Appeal.
9. Assignment of Errors.

10. Stipulation as to Exhibits and Order.
11. Citation.
12. Praecipe for Appeal and All Minute Orders of the Court, except those of postponement.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Petitioner. [1*]

[Endorsed]: Filed Nov. 27, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [2]

*In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, First Division.*

No. 16,290.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of his Wife QUOK SHEE.

Petition for Writ of Habeas Corpus.

The petition of Chew Hoy Quong respectfully
shows:

I.

That your petitioner is a person of Chinese extrac-
tion, with the standing of a merchant within the
meaning of section 2 of the Act of November 3d,
1893 (28 Stat. L. 7), entitled, "an Act to amend an
act entitled 'an Act to prohibit the coming of
Chinese persons into the United States,' approved
May 5th, 1892," and as such is duly authorized to
be and remain in the United States and to be ac-

*Page-number appearing at foot of page of original certified Transcript
of Record.

corded all the rights, privileges, immunities and exemptions which are accorded the citizens of the most favored nation.

II.

That the said Quok Shee, also known as Quok Sun Moy, the detained person and wife of petitioner on whose behalf this petition is made and as such wife is entitled under the law to enter the United States of America.

III.

That said Quok Shee is unlawfully imprisoned, detained, confined and restrained of her liberty by Edward White, Commissioner of Immigration, who is the person who has the care, custody and control of the body of said Quok Shee at the Immigration Station of the [3] United States at Angel Island, Bay of San Francisco, in this Northern District of California and is about to be deported therefrom to China.

IV.

That your petitioner is a resident Chinese merchant lawfully domiciled in the City and County of San Francisco, State of California, and has been such merchant for twenty odd years past; that on the 15th day of May, 1915, your petitioner departed from the United States for China on a temporary visit; that while in China and on or about February 21st, 1916, your petitioner was united in marriage according to the Chinese custom to the said Quok Shee; that thereafter, and in the month of July, 1916, your petitioner departed from China with his said wife for the United States arriving at this

port of San Francisco September 1st, 1916; that thereupon the said Quok Shee made application for admission to the United States as the wife of a merchant; that thereafter and on the 5th day of September, 1916, a hearing was had before J. B. Warner, Inspector, who reported favorably on said application; that thereafter the said Commissioner, Edward White, ordered a re-examination before the Law Department of Immigration at Angel Island; that thereafter and on the 13th day of September, 1916, said application was reheard before one W. H. Wilkinson for the law section of said department of immigration who reported unfavorably upon said application; that thereupon said Edward White made a finding that said Quok Shee had not established the existence of her relationship to her alleged husband, your petitioner, and the said application was thereupon denied; that thereafter the said Quok Shee appealed from said decision and finding to the Secretary of Labor at Washington, D. C., who subsequently ordered said Quok Shee deported.

V.

That the illegality of said imprisonment, detention, confinement and restraint of liberty consists in the following:

That on the 25th day of September, 1916, after notice of appeal had been filed to the Secretary of Labor by the then attorneys [4] of record for Quok Shee, and request was made in writing by said attorneys, that they be granted the privilege of interviewing the applicant for the purpose of introducing further evidence in support of her appeal.

That thereafter on the 26th day of September, 1916, the Commissioner of Immigration refused counsel the right to interview the applicant, stating that there was no authority in either the law or regulations for the granting of such a request. A copy of said request for an interview and a copy of the letter denying the request are affixed hereto marked exhibit "A."

That by the reason of the Commissioner of Immigration refusing to grant counsel the right of an interview, and holding applicant incommunicado, said acts constituted an unfair hearing and that applicant was not given an opportunity to perfect her appeal and submit additional evidence in support thereof, as is granted under the Treaty Laws and Rules governing the Admission of Chinese, as in force and effect and is in direct contravention to Rule 5, Subdivision b and c of said rules and regulations.

That by said acts applicant was denied the right of counsel and she was and is deprived of her liberty without due process of law.

That the said Quok Shee has exhausted all her rights and remedies, and has no further rights and remedies before the Department of Labor and unless a Writ of Habeas Corpus issue out of this court as prayed for, and directed to Edward White, Commissioner of Immigration, in whose custody the body of said Quok Shee is, the said Quok Shee, will be forthwith deported from the United States to China, without due process of law.

VII.

That your petitioner is the husband and next friend

of said Quok Shee and makes this petition for and on her behalf. That he is familiar with all the facts of the case and that said Quok Shee cannot petition this Court in her own behalf by reason of said detention and restraint, and, therefore, your petitioner makes this petition [5] for her.

VIII.

That heretofore on November 24, 1916, a Writ of Habeas Corpus was petitioned for, on grounds *nor* included in this petition. That at the time of filing said first petition the fact of holding applicant incommunicado and denying her the right to see her counsel for the purpose of submitting additional evidence in support of her appeal was not contained in that portion of the record available to the attorneys for the petitioner. That the Writ of Habeas Corpus heretofore applied for was denied petitioner and all proceedings terminated thereon.

IX.

That the records of the immigration authorities at Angel Island and the proceedings had before the Secretary of Labor at Washington, D. C., are at present on file with the clerk of the United States Circuit Court of Appeals, and we are therefore unable to have proper copies made of the proceedings so that they may be affixed to this petition, but your petitioner prays that when the afore-mentioned records are available he may file copies of the same as amendment to this petition.

WHEREFORE, the petitioner prays that a Writ of Habeas Corpus be issued by this Honorable Court directed to and commanding said Edward White,

Commissioner of Immigration at the port of San Francisco to have, and produce the body of the said Quok Shee before this Honorable Court, at the Postoffice Building in the city and county of San Francisco at a day and time certain to be fixed by this court, or to show cause if any he has why the writ should not be granted, in order that the alleged cause of imprisonment and detention of said Quok Shee may be examined into so that if it be determined the said detention and imprisonment is unlawful and illegal, that the applicant was not given a fair hearing, that the said Quok Shee may be discharged from the custody, detention and imprisonment. That a copy of this petition be served on the United States Attorney, and a copy of the order prayed for is to be served on the said Commissioner [6] of Immigration.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

State of California,
City and County of San Francisco,—ss.

Dion R. Holm, being first duly sworn, on behalf of the petitioner, Chew Hoy Quong, in the above-entitled action, deposes and says:

That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information and belief and as to those matters that he believes them to be true.

That said petitioner, Chew Hoy Quong, is absent from the City and County of San Francisco, where

Dion R. Holm and Roy A. Bronson, reside and have their offices; and the facts contained in the petition are within the knowledge of this affiant, who is one of the attorneys of record for petitioner and therefore he makes this petition.

DION R. HOLM.

Subscribed and sworn to before me this 16th day of October, 1917.

[Seal]

JULIA W. CRUM.

Notary Public, in and for the City and County of San Francisco, State of California. [7]

Exhibit "A" to Petition for Writ of Habeas Corpus.

P.4 Immigration rec.

15530/6-29

Sept. 25, 1916.

Hon. Edward White,

Commissioner of Immigration,

Port of San Francisco,

Dear Sir:

In re QUOK SHEE, Merchant's Wife.

15530—16-29, ex. S. S. Nippon Maru, Sept. 1st, 1916.

This applicant has been detained at this port since the 1st day of September, 1916. She has been held incommunicado by you and has been permitted to have no communication with her husband, nor he with her since that time. Her case has been denied and such proceedings as have been had with respect thereto are now a matter of record. We have received your letter denying our application to have a review of the Law Section or the report of the examining inspector open to our inspection.

We now have upon file in this matter and pending your determination a request for a reopening and reconsideration of this case for the reasons specified in said application. In the event of a denial of this application we desire to have this request of record for an interview of this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.

Yours very respectfully,

McGOWAN & WORLEY.

By GEO. A. McGOWAN,

Attys. for Applicant. [8]

P. 50 Immigration Rec.

15530/6-29.

Sept. 26, 1916.

Messrs. McGowan and Worley,

Attys. at Law,

Bank of Italy Bldg.

San Francisco.

Sirs: Replying to your communication of the 23d and 25th inst., in re Quok Shee alleged wife of a merchant ex. S. S. "Nippon Maru," Sept. 1, 1916, you are advised that your request for reopening in that case contained in the letter first above mentioned must be denied for the reason that there is no apparent ground for the assumption that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the affidavit of the alleged husband is not new evidence within the meaning of the regulations.

The request contained in the 2d above mentioned letter that you as counsel and the alleged husband

be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal must also be denied there being no authority in either the law or regulations for the granting of such a request.

Respectfully,

Acting Commissioner.

WHW/ASH.

Due service and receipt of a copy of the within Petition for a Writ of Habeas Corpus is hereby admitted this 18th day of October, 1917.

Attorney for ———.

[Endorsed]: Filed Oct. 18, 1917. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [9]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 10th day of November, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable, WM. H. HUNT, Judge.

No. 16,290.

In the Matter of QUOK SHEE on Habeas Corpus.

**Minutes of Court—November 10, 1917—Order
Allowing Petitioner to File Amended Petition
for Writ of Habeas Corpus.**

This matter came on regularly this day for hear-

ing of the order to show cause as to the issuance of a Writ of Habeas Corpus herein. On motion of C. A. Ornbaun, Esq., Assistant United States Attorney for the Northern District of California, on behalf of respondent, the Court ordered that said matter be continued to November 17th, 1917.

On motion of attorney for petitioner, Mr. Ornbaun consenting thereto, the Court ordered that petitioner be, and he is hereby permitted to file an amendment to the Petition for Writ of Habeas Corpus herein.
[10]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 16,290.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus, for and on Behalf of His Wife, QUOK SHEE.

Amendment to Petition for Writ of Habeas Corpus.

Comes now your petitioner, Chew Hoy Quong, with leave of the Court first had, and files this document as an amendment to his petition for a Writ of Habeas Corpus heretofore filed. That this amendment should be considered as following line 27, page 3, of the Petition on file.

That your petitioner respectfully alleges that in the records of the United States Immigration Authorities of Angel Island, California, now in the hands of the United States District Attorney for the Northern District of California, in the case en-

titled Lee Tong Shee, numbered 15530/6-30 "Nippon Maru," September 1, 1916, also numbered 54176-66, and in which a Writ of Habeas Corpus was granted by this court in action No. 16,204, the following appears:

"In connection with this case San Francisco forwards confidential matter relative to a concerted move to import Chinese Prostitutes into the United States. The report would indicate that this traffic is still in its infancy, as in each of the cases involved (54176-56-61-66) the wives of three residents of one small village in China applied for Admission at practically the same time. The cases are very similar in all detail. For the Bureau's memorandum of the confidential matter, see 54176-61." This appears on page 50 of Exhibit "A" of the record above referred to.

At page 48 of the same record appears the following:

"Mr. Post this is one of the three cases in which the Department received apparently authentic, confidential information, going to show that the women involved were being brought to this Country for immoral purposes. A. W. P."

[11]

That this case now pending before this Honorable Court was numbered according to the Immigration Authorities, 15530/6-29 and is also known as number 54176-61, which is one of the numbers included in the memoranda above quoted.

That your petitioner alleges upon information and

belief that the immigration authorities decided the case of his wife for admission to the United States adversely for the reason of the above memoranda and not because of any discrepancies in the testimony adduced at the hearings before the immigration authorities.

That at the time your petitioner first applied for a Writ of Habeas Corpus for and on behalf of his wife the memoranda quoted did not appear in that portion of the record which the immigration authorities permitted his wife's attorneys to investigate.

That by receiving confidential matter as stated in the memoranda and in transmitting the same so that it became a part of the record and keeping the information from the wife's attorneys and from the wife and your petitioner the immigration authorities acted in contravention to Rule 5, Subdivision b and c of the Treaty, Laws and Rules Governing the Admission of Chinese to the United States.

That when Quok Shee appealed to the Secretary of Labor she was denied the privilege of rebutting this testimony and consequently deprived a fair hearing before said Secretary rendering the appeal abortive.

That the failure to permit the matters referred to in the memoranda to be of record constituted an unfair hearing and deprived Quok Shee the right of refuting the said matters when an appeal was filed to the Secretary of Labor and that by said acts ap-

plicant was deprived of her liberty without due process of law.

CHEW HOY QUONG,
Petitioner.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for petitioner. [12]

State of California,
City and County of San Francisco,—ss.

Dion R. Holm, being first duly sworn, on behalf of the petitioner, Chew Hoy Quong, in the above-entitled action, deposes and says:

That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information and belief and as to those matters that he believes them to be true.

That said petitioner, Chew Hoy Quong, is absent from the City and County of San Francisco, where Dion R. Holm and Roy A. Bronson, reside and have their offices; and the facts contained in the petition are within the knowledge of this affiant, who is one of the attorneys of record for petitioner and therefore he makes this petition.

DION R. HOLM.

Subscribed and sworn to before me this 5th day of November, 1917.

JULIA W. CRUM,
Notary Public, in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within Amended Petition is hereby admitted this 9th day of Nov., 1917.

JOHN W. PRESTON,

U. S. Attorney.

CHAS. G. HALLIDAY,

Asst. U. S. Attorney,

Attorneys for Respdt.

[Endorsed]: Filed Nov. 10, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [13]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,290.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus, for
and on Behalf of His Wife, QUOK SHEE.

Order to Show Cause.

Good cause appearing therefore and upon reading the verified petition on file herein,—

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the port and district of San Francisco, appear before this Court on the 22d day of October, 1917, at the hour of 10 o'clock of said day, to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein as prayed for and that a copy of this order be served upon the said Commissioner and a copy of said petition upon the United States Attorney.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration aforesaid, or whosoever acting under the orders of said Commissioner and Secretary of Labor, shall have the custody of Quok Shee, are hereby ordered and directed to retain said Quok Shee within the custody of the said Commissioner of Immigration and within the jurisdiction of this court until further order herein.

Dated Oct. 18, 1917.

WM. C. VAN FLEET,
Judge of the United States District Court.

[Endorsed]: Filed Oct. 18, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,290.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus, for and on Behalf of His Wife, QUOK SHEE.

Return (to Order to Show Cause).

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector and in return to the order to show cause issued by the said Court on the petition and amended petition of Chew Hoy Quong for a writ of habeas corpus, and to said petition and

amended petition, admits, denies and alleges as follows:

ADMITS all of paragraph I, on page 1 of said petition.

DENIES that the said Quok Shee, also known as Quok Sun Moy, the detained person, is the wife of petitioner.

DENIES that the said Quok Shee is entitled under the law to enter the United States of America.

DENIES that the said Quok Shee is unlawfully imprisoned, or detained, confined and restrained, or unlawfully imprisoned, or detained, or confined, or restrained of her liberty by Edward White, Commissioner of Immigration, or by any one else, or at all.

ADMITS that petitioner is a resident Chinese merchant, lawfully domiciled in the City and County of San Francisco, State of California, but with reference to the allegation in paragraph IV, page 2 of said petition, namely, that your petitioner has been such merchant for twenty odd years past, respondent has no information or belief sufficient to enable him to answer the same, and basing his answer upon said lack of information, DENIES that said petitioner has been a merchant for twenty [15] odd years past.

ADMITS that on the 15th day of May, 1915, petitioner departed from the United States for China on a temporary visit; DENIES that while in China, and on or about February 21st, 1916, or at any other time, or at all, petitioner was united in marriage according to the Chinese custom, or in any other manner, or at all, to the said Quok Shee; DENIES that

during the month of July, 1916, petitioner departed from China for the United States with his said wife, arriving at the Port of San Francisco September 1st, 1916; ADMITS that upon arrival at the Port of San Francisco the said Quok Shee made application for admission to the United States as the wife of a merchant; ADMITS that thereafter, and on the 5th day of September, 1916, a hearing was had before J. B. Warner, Inspector, who reported favorably on the application; ADMITS that thereafter the said Commissioner, Edward White, ordered a re-examination before the Law Department of Immigration at Angel Island, and that thereafter, and on the 13th day of September, 1916, said application was reheard before one W. H. Wilkinson for the law section of said department of immigration who reported unfavorably upon said application; ADMITS that thereupon said Edward White made a finding that said Quok Shee had not established the existence of her relationship to her alleged husband, your petitioner, and the said application was thereupon denied; ADMITS that thereafter said Quok Shee appealed from said decision and finding to the Secretary of Labor at Washington, D. C., who subsequently ordered said Quok Shee deported.

DENIES that on the 25th day of September, 1916, after notice of appeal had been filed to the Secretary of Labor, by the then attorneys of record for Quok Shee, or at any other time, or at all, a request was made in writing, or otherwise, or at all, by said attorneys that they be granted the privilege of interviewing the applicant for the purpose of introducing fur-

ther evidence in support of her appeal. [16]

In this connection respondent alleges that on the 25th day of September, 1916, a request was made by the attorneys representing petitioner, namely, McGowan & Worley, by George McGowan, for an interview with the applicant by her alleged husband, the petitioner herein, which said request was denied; that the attorneys for the said petitioner never requested an interview with the said petitioner.

DENIES that by reason of the Commissioner of Immigration refusing to grant counsel the right of an interview and holding applicant incommunicado, said acts constituted an unfair hearing; DENIES that applicant was not given an opportunity to perfect her appeal and submit additional evidence in support thereof, as is granted under the Treaty Laws and Rules governing the Admission of Chinese, as in force and effect, or force, or effect; and further DENIES that the said refusal or any act on the part of said Commissioner of Immigration was, or is, in contravention to Rule 5, Subdivision b and c of said rules and regulations.

DENIES that applicant was denied the right of counsel or deprived of her liberty without due process of law, or otherwise, or at all.

ADMITS that the said Quok Shee has exhausted all her rights and remedies and has no further rights and remedies before the Department of Labor and unless a Writ of Habeas Corpus issue out of this court as prayed for, and directed to Edward White, Commissioner of Immigration, in whose custody the body of said Quok Shee is, the said Quok Shee will

be forthwith deported, but DENIES that such deportation would be without due process of law.

DENIES that petitioner is the husband of said Quok Shee.

ADMITS that heretofore, on November 24, 1916, a Writ of Habeas Corpus was petitioned for on grounds not included in this petition, and in this connection respondent alleges that at the time of filing said petition, and prior thereto, the original record of the Commissioner of Immigration, which contained all of the evidence submitted either for or against the said applicant upon [17] the hearing before the Commissioner of Immigration, was at the disposal of, and could be seen by said counsel at their request; that the attorneys, McGowan & Worley, who represented said applicant prior to the time that the said Dion R. Holm and Roy A. Bronson were substituted, had access to and did see all of the evidence and other matters pertaining to the investigation had by the said Immigration officials concerning the right of applicant to land in the United States as the wife of the said petitioner; DENIES that the Immigration authorities decided the case of his wife for admission to the United States adversely by reason of the memorandums appearing on pages 1 and 2 of said amended petition and not because of any discrepancies in the testimony adduced at the hearing before the Immigration authorities; DENIES that when Quok Shee appealed to the Secretary of Labor she was denied the privilege of rebutting the testimony referred to on pages 1 and 2 of said amended petition; DENIES that consequently,

or by reason thereof, or otherwise, or at all, she was deprived of a fair hearing before the Secretary of Labor, or elsewhere, and in this connection respondent alleges that the memorandums referred to on pages 1 and 2 of said amended petition were not before the Secretary of Labor at the time that the appeal of the said applicant was determined and that the same were not in any wise considered by the said Secretary of Labor and had no influence over him in determining said appeal.

As a further, separate and distinct answer and defense to the petition and amended petition on file herein, respondent alleges that upon the application of said detained to enter the United States through the Port of San Francisco certain hearings have been conducted in behalf of said applicant, and testimony and other evidence taken concerning her right to enter and remain in the United States as the wife of said petitioner; that said hearings were conducted and the testimony and other evidence taken by the immigration officials acting for and on behalf of the Government of the United States, and that all of the said evidence and other [18] testimony taken or adduced at said hearing were recorded by the said immigration officials in a record known as the original record of the Bureau of Immigration in the case of Quok Shee; that said testimony and other evidence, and all of the exhibits that were considered with the said record, are by reference incorporated into and made a part of this answer and return, and the same are filed herewith.

As a further answer and defense to said petition

and amended petition on file herein, respondent alleges that during the month of December, 1916, and subsequent to the order of deportation of said Quok Shee by the said Secretary of Labor, the said Quok Shee, through her next friend, the petitioner herein, filed a petition for a Writ of Habeas Corpus in this court, setting forth the same facts and circumstances, with the exception of the memorandums referred to in the said amended petition and the said reference to a refusal on the part of the immigration officers to permit the said applicant to consult her counsel in matters pertaining to her appeal, that now appears in this petition; that at the time of filing the said first petition for a Writ of Habeas Corpus, all of the facts and circumstances were at the disposal of the said applicant or her counsel, or the petitioner, that now appear in the record concerning the case of the said applicant, or referred to by counsel in this petition for a Writ of Habeas Corpus on a demurrer filed by the respondent to said petition; that thereafter an appeal was taken by the said petitioner to the United States Circuit Court of Appeals for the Ninth Circuit and the matter fully presented to said Court and the appeal was denied; that thereafter, and on or about August 28, 1917, the said petitioner petitioned the said United States Circuit Court of Appeals for a rehearing of said case, setting forth in said petition for rehearing the same matters that are now set forth in the said petition before this Court; that said United States Circuit Court of Appeals [19] denied the said rehearing, and in this connection respondent alleges that all of the matters re-

ferred to in said petition, which is now before this Court, have been fully determined.

WHEREFORE, respondent prays that the said petition and said amended petition for a Writ of Habeas Corpus be denied, that the order to show cause be discharged and that said alien be remanded to the custody of the respondent for deportation, as provided for in said warrants of deportation heretofore issued by the Secretary of Labor of the United States and for such other further relief as to this Court seems just and equitable.

JOHN W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Assistant United States Attorney,

Attorneys for Respondent.

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been especially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Petition and to the Amended Petition for a Writ of Habeas Corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or give his attention to said matter; that of affiant's own knowledge the mat-

ters set forth in the Return to the Petition and Amended Petition for Writ of Habeas Corpus are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 15th day of November, 1917.

C. M. TAYLOR,
Deputy Clerk U. S. District Court, Northern District of California. [20]

Due service and receipt of a copy of the Return is hereby admitted this 16th day of November, 1917.

DION R. HOLM,
Attorney for Applicant.

[Endorsed]: Filed Nov. 16, 1917. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [21]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 16,290.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Traverse.

Comes now Chew Hoy Quong, petitioner above-named, and files this document as a Traverse to the Return of Edward White, made and filed to the Petition and Amended Petition, and admits, denies and alleges as follows:

I.

Denies generally and specifically, each and every and all of the allegations contained in the Return of Edward White, Commissioner of Immigration, wherein he denies allegations contained in the Petition for Writ of Habeas Corpus.

II.

That on the 17th day of November, 1917, it was stipulated and agreed by and between Casper Ornbau, Esq., Assistant District Attorney for the United States, representing Edward White, Commissioner of Immigration, and Dion R. Holm, the attorney for petitioner, that the latter would have the privilege of filing a Traverse to the Return of the said Commissioner of Immigration if Dion R. Holm considered it necessary. That the stipulation was entered into because of the fact the Return to the Order to Show Cause was not served upon the attorney for the petitioner until the afternoon of the 16th day of November, 1917. [22]

III.

Denies that on November 24, 1916, or at any time, or at all, that the original records of the Commissioner of Immigration, which contain all of the evidence submitted for or against Quok Shee, upon the hearing before the Commissioner of Immigration at Angel Island, and the Secretary of Labor at Washington, or the Commissioner of Immigration at Angel Island, or the Secretary of Labor at Washington, were open for inspection. That the evidence which was considered at Angel Island and not of record consisted of certain confidential information received

at said station, concerning the applicant and which was forwarded to the Secretary of Labor at Washington. That the petitioner, applicant and her attorneys were not permitted to see this information.

IV.

Denies that all the facts, circumstances and evidence concerning the case of Quok Shee were available to the applicant, or petitioner, or his attorney.

V.

Denies that the Circuit Court of Appeals for the Ninth Circuit determined in this case, when heretofore appealed to that tribunal, and point of holding applicant incommunicado and refusing her attorneys the privilege of an interview, after notice of appeal had been filed to the Secretary of Labor.

WHEREFORE petitioner prays that a Writ of Habeas Corpus be issued by this Honorable Court, directed to and commanding said Edward White, Commissioner of Immigration, to release Quok Shee and admit her to the United States.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Petitioner.

CHEW HOY QUONG,

Petitioner. [23]

State of California,

City and County of San Francisco,—ss.

Dion R. Holm, being first duly sworn, on behalf of the petitioner, Chew Hoy Quong, in the above-entitled action, deposes and says:

That he has read the foregoing Traverse and knows the contents thereof, and that the same is true

of his own knowledge except as to the matters which are therein stated on information and belief and as to those matters that he believes them to be true.

That said petitioner, Chew Hoy Quong, is absent from the City and County of San Francisco, where Dion R. Holm and Roy A. Bronson, reside and have their offices; and the facts contained in the Traverse are within the knowledge of this affiant, who is one of the attorneys of record for petitioner and therefore he makes this affidavit.

DION R. HOLM.

Subscribed and sworn to before me this 19th day of November, 1917.

JULIA W. CRUM,

Notary Public, in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Traverse is hereby admitted this 19th day of November, 1917.

JOHN W. PRESTON,

U. S. Attorney, Attorney for Appellee.

[Endorsed]: Filed Nov. 19, 1917. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [24]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the 17th day of November, in the year of our Lord one thousand nine hundred and seventeen. Present: WM. C. VAN FLEET, Judge.

No. 16,290.

In the Matter of QUOK SHEE, on Habeas Corpus.

**Minutes of Court—November 17, 1917 — Order
Denying Petition for Writ of Habeas Corpus.**

This matter came on regularly for hearing of return to the petition for a Writ of Habeas Corpus herein. After hearing attorney for petitioner and detained, the Court ordered that petitioner have leave to hereafter file a Traverse to said Return. The matter was then argued by attorneys for respective parties, and submitted and after due consideration had thereon, further ordered that the petition for a Writ of Habeas Corpus herein be and the same is hereby denied, to which order an exception was duly entered. [25]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 16,290.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus, for and on Behalf of His Wife, QUOK SHEE.

Notice of Appeal

To the Honorable JOHN W. PRESTON, United States Attorney, and Honorable CASPER A. ORNBAUN, Assistant United States Attorney, Attorneys for Respondent, and to the Clerk of the Above-entitled Court:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the petitioner in the above-entitled action, Chow Hoy Quong, through his attorneys, Dion R. Holm and Roy A. Bronson, feeling himself aggrieved by the judgment of the above-entitled court rendered on November 17th, 1917, denying the Petition for a Writ of Habeas Corpus and sustaining the Return to the Writ of Habeas Corpus, hereby appeals from said judgment and decision to the Circuit Court of Appeals for the Ninth Circuit.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

Dated, November 19, 1917. [26]

Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 19th day of November, 1917.

JOHN W. PRESTON,
U. S. Attorney, Attorney for Appellee.

[Endorsed]: Filed Nov. 19, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. W. C.
[27]

*In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, First Division.*

No. 16,290.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus, for and
on Behalf of His Wife, QUOK SHEE.

Petition for Appeal.

To the Honorable W. C. VAN FLEET, Judge of the
District Court of the United States for the
Northern District of California:

Chew Hoy Quong, the petitioner in the above-entitled action, appellant herein, feeling aggrieved by the order and judgment made and entered in the above-entitled cause on the 17th day of November, 1917, whereby it was ordered and adjudged that the Application and Petition for the Writ of Habeas Corpus be denied, and the Return thereto be sustained, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and prays that

his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents and all of the papers upon which said order and judgment were based duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in accordance with the law in such case made and provided, and that all further proceedings in this matter be stayed until the final determination of said appeal.

Dated, November 19, 1917.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Petitioner. [28]

Due service and receipt of a copy of the within Petition for Appeal is hereby admitted this 19th day of November, 1917.

JOHN W. PRESTON,
U. S. Attorney, Attorney for Appellee.

[Endorsed]: Filed Nov. 19, 1917, W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [29]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 16,290.

In the Matter of the Application of CHEW HOY QUONG for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Assignment of Errors.

Now comes the petitioner in the above-entitled matter by his attorneys, Dion R. Holm and Roy A.

Bronson, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made by this Honorable Court on the 17th day of November, A. D. 1917:

I.

That the Court erred in denying the petition for a Writ of Habeas Corpus.

II.

That the Court erred in sustaining the Return to the petition for a Writ of Habeas Corpus.

III.

That the Court erred in not granting the petition for a Writ of Habeas Corpus, and in not discharging Quok Shee.

IV.)

That the Court erred in finding that there was not an abuse of discretion, an unfair hearing and a failure to observe due process of law on the part of the immigration authorities when they denied the attorneys for the applicant the right of [30] interviewing her for the purpose of obtaining further evidence in support of her appeal to the Secretary of Labor.

V.

That the Court erred in holding that it was not an abuse of discretion and an unfair hearing to consider confidential matter concerning the applicant, wherein she was alleged to be brought to this country for immoral purposes, and that by reason of the withholding of said confidential matter she was not deprived of her liberty without due process of law.

WHEREFORE, because of the many manifest errors committed by said Court, Chew Hoy Quong, through his attorneys, prays that the said judgment sustaining the Return to the petition for a Writ of Habeas Corpus and denying the petition for a Writ of Habeas Corpus, be reversed, and for such other and further relief as the Court may think meet and proper.

Dated, November 19, 1917.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 19th day of November, 1917.

JOHN W. PRESTON,
U. S. Attorney, Attorney for Appellee.

W. C.

[Endorsed]: Filed Nov. 19, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [31]

*In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, First Division.*

No. 16,290.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus, for and
on Behalf of His Wife, QUOK SHEE.

Order Allowing Appeal.

On motion of Dion R. Holm and Roy A. Bronson,

attorneys for Chew Hoy Quong, petitioner in the above-entitled cause,—

IT IS HEREBY ORDERED that on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment heretofore made and entered herein, sustaining the Return to the petition for a Writ of Habeas Corpus, and denying the application for a Writ of Habeas Corpus, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law and that meanwhile all further proceedings in this court and by the immigration authorities be suspended, stayed and superseded until the determination of said appeal.

Dated, November 19, 1917.

WM. C. VAN FLEET,

Judge of the District Court of the United States in
and for the Northern District of California.

[32]

Due service and receipt of a copy of the within order allowing appeal is hereby admitted this 19th day of November, 1917.

JOHN W. PRESTON,

U. S. Attorney,
Attorney for Appellee.

[Endorsed]: Filed Nov. 19, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [33]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 16,290.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Stipulation (as to Exhibits) and (Order That the Originals be Transmitted to the U. S. C. C. A.).

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties in the above-entitled cause that the original record of the Bureau of Immigration, which was filed in the above-entitled court as respondent's exhibit, may be transferred in its original form, and without being transcribed, to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is and may there be considered part of the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit without objection on the part of either of said respective parties.

AND IT IS FURTHER STIPULATED that the testimony attached to the petitioner's amendments to his petition for a Writ of Habeas Corpus need not be transcribed, as they are contained in the original record of the Bureau of Immigration.

Before signing the above stipulation the United States Attorney and Assistant United States Attorney requested that it be here inserted, that they in

no way countenanced the appeal in the above-entitled action and that they considered such an appeal frivolous. [34]

Dated, November 27, 1917.

JOHN W. PRESTON,
United States Attorney.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Chew Hoy Quong.

IT IS HEREBY ORDERED that the above stipulation be observed.

WM. W. MORROW,
Judge of the United States Circuit Court.

[Endorsed]: Filed Nov. 27, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [35]

**Certificate of Clerk U. S. District Court to Transcript
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Quok Shee, on Habeas Corpus, No. 16,290, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "Praeceptum for Transcript of Record" (copy of which is embodied in this transcript) and the instructions of the attorney for petitioner and appellant.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Thirteen Dollars and Ten Cents (\$13.10), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein (page 37).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 12th day of December, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

TMC. [36]

(Citation on Appeal—Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Edward White, Commissioner of Immigration at Angel Island, California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Chew Hoy Quong as petitioner for and on behalf of his wife Quok Shee, are appellants, and you are ap-

pellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. C. VAN FLEET,
United States District Judge for the Northern District of California, this 19th day of November, A. D. 1917.

WM. C. VAN FLEET,
United States Dist. Judge. [37]

[Endorsed]: No. 16,290. United States District Court for the Northern District of California. Chew Hoy Quong, for Quok Shee, Appellant, vs. Edward White, as Commissioner of Immigration. Citation on Appeal. Filed Nov. 19, 1917. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

Received copy of within citation, this 19th November, 1917.

JNO. W. PRESTON,
U. S. Attorney,
Attorney for Appellee.

[Endorsed]: No. 3088. United States Circuit Court of Appeals for the Ninth Circuit. Chew Hoy Quong, as Petitioner for and on Behalf of His Wife, Quok Shee, Appellant, vs. Edward White, Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of the Record. Upon Appeal from the Southern Division

of the United States District Court for the Northern District of California, First Division.

Filed December 12, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong
for a Writ of Habeas Corpus, for and on Behalf
of His Wife, Quok Shee.

BRIEF FOR APPELLANT.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Appellant.

Filed this.....day of February, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 3088.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

**In the Matter of the Application of Chew Hoy Quong
for a Writ of Habeas Corpus, for and on Behalf
of His Wife, Quok Shee.**

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the United States, in and for the Northern District of California, denying the petition for writ of *habeas corpus*, and sustaining the return thereto. (Trans., p. 28.)

Chew Hoy Quong is a person of Chinese descent with the status of a merchant, which he has held for

twenty odd years past. On May 15th, 1915, he departed from the United States for China and while there, on February 21st, 1916, was married according to the Chinese custom to Quok Shee.

Chew Hoy Quong and Quok Shee left China for the United States and arrived at the port of San Francisco, September 1st, 1916. Chew Hoy Quong was admitted forthwith as a returning merchant, which status has never been questioned by the immigration authorities. His wife, Quok Shee, made application for admission to the United States as the wife of her merchant husband, Chew Hoy Quong. On September 5th, 1916, a hearing was had before the examining inspector at Angel Island to consider the grounds of her claim. After a full hearing the examining inspector reported favorably as to the admission of Quok Shee.

For some unknown reason a rehearing was ordered by the Commissioner of Immigration, and on September 13th her right to admission was denied, the finding being that her relationship to her husband had not been properly established. An appeal was taken to the Secretary of Labor at Washington, D. C., who subsequently ordered Quok Shee deported. On November 24th, 1916, a petition for a writ of *habeas corpus* was filed in the District Court for the Northern District of California, based upon grounds other than herein involved. The petition was denied and an appeal taken to the Circuit Court of Appeals where the lower court was sustained and a rehearing denied.

Before this appeal was perfected it was stipulated by and between the United States attorney and counsel

for appellant that the original records of the proceedings held before the immigration authorities at Angel Island should be transferred to this Court in their original form and be considered a part of the transcript of record. References will be made to the transcript of record in the following manner (Transcript, p. ...), and to the immigration records as (Record, p. ...).

ARGUMENT.

Our argument for the issuance of the writ may be divided under two heads.

1. When notice of appeal was filed from the decision of the Commissioner of Immigration at Angel Island the then attorneys of record for Quok Shee were denied the right to interview the applicant. The purpose of the interview was to consult her and discover if she had further evidence to offer in support of her appeal.

2. That the Department at Angel Island received confidential reports relative to Quok Shee, which were withheld from the attorneys of record, who were thereby unable to meet the questions involved on appeal to the Secretary of Labor and that the said Quok Shee was denied her right of appeal.

That the District Court was in error when they denied the petition for a writ of *habeas corpus* and sustained a return thereto and that the error consisting in not ordering a trial *de novo* when the traverse to the return was filed and questions of fact arose.

I.

We base our first contention as to the refusing the right of interviewing the applicant, after notice of appeal had been filed from the decision of the Commissioner of Immigration at Angel Island, on the case of

Mah Shee, by Chun Leong, vs. Edward White etc., No. 2946, 242 Federal, 868,

which is absolutely in point and the facts are identical with this case. The attorneys in the Mah Shee case were the same as in the Quok Shee case at Angel Island. On page 9 of the Transcript the following appears as a communication from the Commissioner of Immigration to the attorneys for the applicant:

"15530/6-29.

Sept. 26, 1916.

Messrs. McGowan and Worley,
Attys. at Law,
Bank of Italy Bldg.
San Francisco.

Sirs: Replying to your communication of the 23d and 25th inst., in re Quok Shee alleged wife of a merchant ex. S. S. 'Nippon Maru,' Sept. 1, 1916, you are advised that your request for re-opening in that case contained in the letter first above mentioned must be denied for the reason that there is no apparent ground for the assumption that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the affidavit of the alleged husband is not new evidence within the meaning of the regulations.

The request contained in the 2d above mentioned letter that you as counsel and the alleged husband be permitted to interview the applicant

as a basis for the introduction of further evidence in support of her appeal must also be denied there being no authority in either the law or regulations for the granting of such a request.

Respectfully,

.....,

Acting Commissioner.

WHW/ASH."

The Mah Shee case contained just such a letter as above quoted. This Court held that such an order deprived an applicant of a full and fair hearing and constituted an unfair hearing, saying:

"If new evidence has been discovered favorable to the applicant, or if evidence in addition to that which has been brought out at the hearing is in her possession or in the possession of her counsel she may present or submit the same for consideration to the Secretary of Labor. Now, it being her right to submit such additional or further evidence, the applicant is in no position to avail herself of its benefit unless she can communicate with her counsel who read the testimony contained in the record of exclusion, to the end that by affidavit or supplementary statement she may set forth the new or additional evidence upon which she may rely. To hold that a Chinese woman should make the showing herself would be absurd, and moreover, every rule of fair procedure would indicate that the presentation of such new evidence to be considered on appeal, may be by the applicant's counsel. We therefore think that when counsel for Mah Shee requested an interview with the applicant as a basis for the introduction of further evidence in support of her appeal they but asked for an opportunity whereby she might be able to avail herself of a right recognized by the regulations as belonging to her, and that denial of the request so made, deprived her of a fair, though

summary hearing according to the law and the regulations of the department."

We consider that this decision sustains our first contention and will add nothing further in the way of argument other than to call the Court's attention to the original letter contained in the Immigration Records. (Record, p. 50.)

II.

In the amendment to the petition of the writ of *habeas corpus* found in the Transcript, p. 11, and particularly at p. 12, the allegations are there set out that in the case of Lee Tong Shee, numbered 15530/6-30 of the Nippon Maru and in which a writ of *habeas corpus* had been granted by the District Court in an action known as 16204, that confidential matter was considered in that case and in this case now before the Court as is shown by the numbers set forth at p. 12 of the Transcript. This case of Quok Shee was known to the immigration authorities by the numbers of 15530/6-29 and 54176-61. The allegations referred to show that the Commissioner of Immigration actually had this confidential matter before him, considered the same and forwarded it to the Secretary of Labor. They also stated that for the bureau's information of the confidential matter they should see case number 54176-61, which is this case, and they thereby tacitly admit that the confidential report was part of the record. It follows quite clearly and logically that this applicant was deprived of her right of appeal

because this confidential report was withheld from the attorneys for Quok Shee and they were unable on appeal to meet the facts of the case, as they were undisclosed. Under the rules and regulations governing the admission of Chinese, particularly calling the Court's attention to rule 5, subdivisions b and c, in which it is stated that the attorneys are entitled to see all evidence and testimony adduced in the case. It was an arbitrary decision on the part of the immigration authorities at Angel Island to withhold this report and contrary to the above referred to rule. How could an appeal be intelligently presented when, first, the immigration authorities refused to permit the attorneys of record to interview the applicant for the purpose of discovering if she had additional evidence to offer in support of her appeal, and, secondly, when the immigration authorities, as they actually did, withhold a portion of the record? The attorneys are entitled to know what was the basis of the decision and what questions they have to meet on appeal and the withholding of the same thereby renders the appeal of Quok Shee abortive. Such conduct must strike this Court as being highly unfair. As to the District Court denying the writ, when this point was brought to its attention it was decidedly a mistake of law and as the question was directly raised by the amendment to the petition, the return and traverse thereto, the District Court should have ordered a trial *de novo* to determine this fact.

In conclusion, therefore, it appears from the memoranda quoted in the amendment to the petition, that

information was included in the record which the Department regarded as confidential and therefore denied applicant's counsel the right to examine it, but that *information* was *evidence* adduced in the matter of the hearing of this case before the Department and, under rule 5, subdivision b of the rules governing the admission of Chinese, applicant's counsel had the unqualified right of examining the same, despite the fact that the Department regarded it as confidential.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Appellant.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG, as Petitioner
for and on behalf of His Wife,
QUOK SHEE,

Appellant,

vs.

EDWARD WHITE, Commissioner of
Immigration at the Port of San
Francisco, California,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of
California, First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

Filed this.....day of March, A. D., 1918.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

FILED
MAR 3 1918
F. D. MONCKTON,
CLERK

No. 3088

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG, as Petitioner
for and on behalf of His Wife,
QUOK SHEE,

Appellant,

vs.

EDWARD WHITE, Commissioner of
Immigration at the Port of San
Francisco, California,

Appellee.

BRIEF OF APPELLEE.

The petitioner seeks the discharge of the detained Quok Shee, a Chinese applicant for admission before the Immigration authorities, as the wife of a domiciled Chinese merchant, upon two grounds. The first ground is alleged in the petition for the writ (Tr. pp. 2 to 7) and the other in the amendment to the petition (Tr. pp. 11 to 14).

The allegation respecting the first ground appears in the petition as follows: (Tr. pp. 4 and 5).

“That on the 25th day of September, 1916, after notice of appeal had been filed to the

Secretary of Labor by the then attorneys of record for Quok Shee, and request was made in writing by said attorneys, that they be granted the privilege of interviewing the applicant for the purpose of introducing further evidence in support of her appeal.

That thereafter on the 26th day of September, 1916, the Commissioner of Immigration refused counsel the right to interview the applicant, stating that there was no authority in either law or regulations for the granting of such a request."

The request and denial referred to are as follows:

“15530-6-29

Sept. 25, 1916.

Hon. Edward White,

Commissioner of Immigration,

Port of San Francisco.

Dear Sir:

In re QUOK SHEE, Merchant's Wife.
15530-16-29, ex S. S. Nippon Maru, Sept 1st,
1916.

This applicant has been detained at this port since the 1st day of September, 1916. She has been held incommunicado by you and has been permitted to have no communication with her husband, nor he with her since that time. Her case has been denied and such proceedings as have been had with respect thereto are now a matter of record. We have received your letter denying our application to have a review of the Law Section or the report of the examining inspector open to our inspection.

We now have upon file in this matter and pending your determination a request for a reopening and reconsideration of this case for the reasons specified in said application. In the event of a denial of this application we desire to have this request of record for an interview of this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.

Yours very respectfully,

McGOWAN & WORLEY,
By GEORGE McGOWAN,
Attorneys for Applicant.

P. 50 Immigration Rec.

15530-6-29.

Sept. 26, 1916

Messrs. McGowan & Worley,
Attys. at Law,
Bank of Italy Bldg.,
San Francisco.

Sirs: Replying to your communication of the 23rd and 25th inst., in re Quok Shee alleged wife of a merchant ex. S. S. "Nippon Maru," Sept. 1, 1916, you are advised that your request for reopening in that case contained in the letter first above mentioned must be denied for the reason that there is no apparent ground for the assumption that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the affidavit of the alleged husband is not new evidence within the meaning of the regulations.

The request contained in the 2d above mentioned letter that you as counsel and the alleged

husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal must also be denied there being no authority in either the law or regulations for the granting of such a request.

Respectfully,

.....

WHW-ASH.

Acting Commissioner."

As to the second point, the amendment to the petition sets forth two memoranda contained in the record of the Bureau of Immigration at Washington, D. C. of an entirely different case—that of Lee Tong Shee—referring to certain confidential information that had been received by the Department of Labor from the Commissioner of Immigration at San Francisco concerning the said Lee Tong Shee and two other Chinese female applicants—one of them, Quok Shee, the detained in this case now before this Court. In respect to this, the petition alleges:

“That your petitioner alleges upon information and belief that the immigration authorities decided the case of his wife for admission to the United States adversely for the reason of the above memoranda and not because of any discrepancies in the testimony adduced at the hearings before the immigration authorities.”

The respondent, in his return to the petition and the amendment to the petition, denied, first: the allegation that a request had been made by Quok Shee's

attorneys that they had granted the privilege of interviewing Quok Shee for the purpose of introducing further evidence in support of her appeal, and second: that when Quok Shee appealed to the Secretary of Labor she was denied the privilege of rebutting the confidential matter referred to in the memoranda for the reason that the said memoranda were not before the Secretary of Labor at the time the appeal of Quok Shee was determined that the said memoranda were not in anywise considered by the Secretary of Labor and that they had no influence over the Secretary of Labor in his determination of the appeal.

The Court's attention is particularly called to the following allegations contained in the return: (Trans. pp. 21 to 23),

“As a further answer and defense to said petition and amended petition on file herein, respondent alleges that during the month of December, 1916, and subsequent to the order of deportation of said Quok Shee by the said Secretary of Labor, the said Quok Shee, through her next friend, the petitioner herein, filed a petition for a writ of habeas corpus in this court, setting forth the same facts and circumstances, with the exception of the memorandums referred to in the said amended petition and the said reference to a refusal on the part of the immigration officers to permit the said applicant to consult her counsel in matters pertaining to her appeal, that now appears in this petition; that at the time of filing the said first

petition for a Writ of Habeas Corpus, all of the facts and circumstances were at the disposal of the said applicant or her counsel, or the petitioner, that now appear in the record concerning the case of the said applicant, or referred to by counsel in this petition for a Writ of Habeas Corpus on a demurrer filed by the respondent to said petition; that thereafter an appeal was taken by the said petitioner to the United States Circuit Court of Appeals for the Ninth Circuit and the matter fully presented to said Court and the appeal was denied; that thereafter, and on or about August 28, 1917, the said petitioner petitioned the said United States Circuit Court of Appeals for a rehearing of said case, setting forth in said petition for rehearing the same matters that are now set forth in the said petition before this Court; that said United States Circuit Court of Appeals denied the said rehearing, and in this connection respondent alleges that all of the matters referred to in said petition, which is now before this Court, have been fully determined."

The proceedings in this Court and to which reference is had in the portion of the return just quoted, are entitled: "Chew Hoy Quong, Appellant, vs. Edward White, Appelle, Number 2926."

Counsel for the appellant will not deny that the District Court disposed of the point that Quok Shee's counsel was, on request, denied the privilege of an interview with her regarding her appeal, solely upon the ground that the Court could not properly hear the petitioner urge in this second proceed-

ing a point that he might have raised, but failed to raise, in the former proceeding.

Even if the merits of this first contention of unfairness should be gone into, it would take but a glance effectually to differentiate this case from that of Mah Shee, cited by the appellant in this brief, for here the alleged requests reads:

“We desire to have this request of record for an interview of this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.”

While in the Mah Shee case the request read:

“We now request an interview with this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.”

Thus, it is perfectly obvious that in this case of Quok Shee, the request was simply for an interview with her by her alleged husband and not by her attorneys; and that in the Mah Shee case, the request was for an interview with her by both the alleged husband and her attorneys.

In its opinion in the Mah Shee case, this Court, in holding that the refusal to permit the interview in so far as the attorneys were concerned constituted unfairness, expressly stated that there was no unfairness in the refusal in so far as the alleged husband was concerned. While it is true that in this Quok Shee case, the Commissioner of Immigration

in refusing the request as made, included the attorneys, such inclusion of the attorneys was plainly an inadvertance, for, as has been already stated, the request did not include an interview by the attorneys.

As to the second and remaining point raised by the petitioner, to-wit: that the said memoranda in the Lee Tong Shee case refers to the receipt by the Department of certain confidential matter involving Quok Shee, the alien concerned in the instant case, it is thought necessary to do no more than refer to the entire Immigration record containing all the evidence and proceedings by the local Commissioner of the Bureau of Immigration and the Department of Labor, which record is designated as respondent's Exhibit "A" and is now before this Court in this appeal. This record does comprise, and must be presumed to comprise, all of the evidence and other matter that were before the Secretary and that he considered when he passed upon the appeal in this case.

Although the Government is confident that this Court will confirm the order of the lower court in dismissing the appeal for the writ, it is thought advisable, out of an abundance of precaution, to take occasion to pray that in the event the lower court is reversed, that Court be instructed that should it consider an order of discharge proper in the future proceeding before it, such order shall not be final but conditional, to be effective only in case the Im-

migration authorities should fail to give Quok Shee, applicant for admission, the fair hearing required by law, within thirty days after the issuance of the mandate by this Court. Such an order is contained in the concluding paragraph of the opinion of this Court in *White vs. Wong Quen Luck*, 243 Fed. at page 549. An express order to this effect would be made necessary by a recent expression of the District Court that it was disposed to afford the Immigration authorities opportunity to conduct a fair hearing before discharging an alien only when this Court expressly so orders in the particular case.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CHEW HOY QUONG, as Petitioner for
and on behalf of his wife, Quok Shee,

Appellant,

VS.

EDWARD WHITE, Commissioner of Im-
migration at the Port of San Francisco,
California,

Appellee.

APPELLANT'S CLOSING BRIEF.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Appellant.

Filed this.....day of March, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 3088.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CHEW HOY QUONG, as Petitioner for
and on behalf of his wife, Quok Shee,

Appellant,

vs.

EDWARD WHITE, Commissioner of Im-
migration at the Port of San Francisco,
California,

Appellee.

APPELLANT'S CLOSING BRIEF.

The above cause has heretofore been argued and submitted, appellant herein, by leave of court first had and obtained, submits the following in reply to the brief of appellee herein.

I.

The doctrine of the Mah Shee Case applies.

Appellee attempts to differentiate the case at bar from the case of *Mah Shee vs. White*, 242 Fed. 868. It is urged by him that counsel *as such* did not request an interview with the applicant, but that they confined their request to an interview with the husband alone.

But counsel's request for an interview expressly stated that it was for the purpose of introducing further evidence in support of her appeal (Trans., p. 8), and manifestly such a broad request contemplated the attendance of her counsel. Certainly it was so understood by the commissioner, for in denying the request he expressly set forth that "*you as counsel* and the alleged husband" could not be permitted to interview the applicant. (Trans., p. 9.)

Under the doctrine of the *Mah Shee* case, *supra*, it is the *refusal* which constitutes the error, for in that case it was said:

"We will add that if the *refusal* of the immigration officials had been limited only to that part of the request which contemplated the presence of Chung Leong at the interview asked for, we do not see that injustice would have been done."

In brief, therefore, the plain intent of the request made contemplated the attendance of the attorneys and the refusal expressly denied them that right.

II.

That confidential information was adduced and withheld from applicant's counsel.

The amended petition which sets forth the memoranda, together with the admission of the return in regard thereto shows cause for the issuance of the writ forthwith.

It appears conclusively from that memoranda, first, that information was received relative to this case by the Commissioner at Angel Island, forwarded to the

Secretary of Labor, which the Department deemed confidential and authentic; secondly, it appears that the entire memoranda of that confidential information was on file with the Quok Shee record. (Trans., p. 12.)

That the Commissioner at Angel Island and the Secretary of Labor actually took into consideration the confidential matter appears from the context of the memoranda at page 12 of the transcript. It is there stated to see the case at bar for the confidential matter.

Now, whether the Department actually used that information or not becomes unimportant in the light of the fact that the information was withheld from the applicant's attorneys, both at the time they requested a rehearing before the Commissioner and at the time they were allowed to inspect what purported to be a complete record of the proceedings for the purpose of preparing their case on appeal.

This fact is not denied in the return to the petition and amended petition and shows cause for the issuance of the writ forthwith. It is not within the province or power of the Commissioner to adduce testimony and then to withhold it merely because he deems it confidential. It is within the express inhibition of Rule 5, Sub. (b) of the rules of the department governing these cases and the withholding of same deprived applicant of a fair hearing and constituted a gross abuse of discretion.

The memoranda which is admitted speaks for itself and the withholding of the information not being

denied, we submit the cause should be reversed and remanded with directions to let the writ issue forthwith.

III.

Disposition in event of reversal.

Respondent has suggested that in the event the lower court is reversed this Court should order the lower court, if it consider an order of discharge proper in the future proceeding before it, to make that order conditional upon the immigration officials giving the applicant a fair hearing within a period of days.

We do not understand this to be a proper nor an approved procedure.

When the Court finds that a full and fair hearing has been denied the detained in cases of this character, the inquiry naturally presents itself: is the detained entitled to her enlargement? This of course cannot be determined without knowledge of facts and to determine those facts a hearing must be had and since the Court under the *habeas corpus* proceedings has acquired jurisdiction over both the party and the subject matter it may proceed to determine whether or not the detained comes within the terms of the excluding statute before making the discharge absolute.

To make a conditional discharge as suggested, is to remand to the immigration officials. But such a procedure virtually makes the District Court a reviewing tribunal of the Department's decisions.

If an order is made referring this matter to the Commissioner of Immigration again, a fair and impar-

tial hearing is impossible as the confidential matter is on file and the laical minds of the Commissioner and the Examining Inspectors have, in a sense, been poisoned by this confidential matter. There is nothing to assure this Court or the applicant that a fair and impartial hearing will be granted as the confidential matter is on file at the Immigration Station. This Court nor the applicant have no assurance that the Examining Inspectors and Commissioner of Immigration will not again consider this confidential information keeping every trace of it out of the record.

The following authorities adopt and approve the method of procedure which we understand to prevail.

In *Chin Yow, vs. United States*, 208 U. S. 8, 52 L. Ed. 369, Mr. Justice Holmes says:

“The petitioner then is imprisoned for deportation without the process of law to which he is given a right. *Habeas corpus* is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner prove his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.”

In *Whitfield vs. Hanges*, 222 Fed. 745, the Circuit Court of Appeals passed directly upon the point raised by respondent herein. Said the Court (page 756):

"The order of the court below was that the appellees be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of *habeas corpus* and finds that his hearing has been unfair retains custody and jurisdiction of him and of the case, and tries the merits *de novo* on evidence introduced before that court the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before making his discharge absolute. Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance."

Again in the case of *United States vs. Williams*, 193 Fed. 228, Judge Hand decides the question in conformity with the reasoning of the foregoing cases. After determining that a full and fair hearing had been denied the alien immigrant and that consequently the writ should issue, says:

"The question must then be determined: What further disposition shall be made? Under *Chin Yow vs. United States*, 208 U. S. 8; 52 L. Ed. 369, it seems to me that, once I have taken jurisdiction I must dispose of the question as to the alien's freedom. It is true that the issue there was citizenship; but the character of the issue is irrelevant, so long as upon it depends the right of the relator to enter the country, the unlawful deprival of which right is, under *Chin Yow vs. United States*, *supra*, an unlawful imprisonment. Mr. Weissager suggests that I may send him back to the immigration authorities with direction for hearing before the board of special in-

quiry; but this presupposes a right of review of their proceedings, which I do not understand I have. I think but one question is to be determined by me, and that is, whether he is wrongfully detained. The preliminary question in determining that, is whether he has been denied the right which the statute vouchsafes him. Then, if I decide he has been denied these, I must determine whether he is entitled to his enlargement, and that brings up the question whether he is excluded within the terms of the statute or not. I cannot determine that without further facts, and in order to obtain those facts there must be a hearing."

In *United States vs. Ruiz*, 203 Fed. 441, 121 C. C. A. 551, the Court says:

"If a fair though summary hearing has been denied the immigrant, the District Court has jurisdiction to hear the matter, upon the merits, upon *habeas corpus*, and release the immigrant, if it be shown on the hearing before it, even by evidence not offered on the hearing before the executive officers, that he does not belong to any one of the excluded classes. As a preliminary to entering upon a trial of the merits, the District Court must first determine that the immigrant was denied a fair hearing before the Commissioner of Immigration or before the Secretary upon appeal to him from the Commissioner. (*United States vs. Ju Toy*, 198 U. S. 253; *Chin Yow vs. U. S.*, 208 U. S. 8.)"

In *United States vs. Cau Pon*, (C. C. A.) 168 Fed. 479, at page 484, Judge Gilbert, in rendering the opinion of the Court, said:

"Having been denied the benefit of all the testimony taken upon the question of his right of

admission to the United States, the applicant has been deprived of the right of appeal which the statute confers upon him, and he may, therefore, upon *habeas corpus*, test the legality of his imprisonment."

The jurisdiction and power of the District Court to hear *de novo* the merits is derived expressly from the terms of the Judicial Code. (R. S., sec. 761.)

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, *and thereupon to dispose of the party as law and justice require.*"

We respectfully submit, therefore, that the order of the District Court be reversed, with directions to let the writ issue, and for the District Court to try *de novo* the merits as to whether the applicant is entitled to admission.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Appellant.

United States
Circuit Court of Appeals,
For the Ninth Circuit.

UNITED VERDE COPPER COMPANY, a West
Virginia Corporation,
Plaintiff in Error,
VS.

NICK KUCHAN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

FILED
DEC 27 1917
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
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*In the Superior Court of the State of Arizona, in
and for the County of Yavapai.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Complaint.

The plaintiff, Nick Kuchan, complaining of the defendant, United Verde Copper Company, a corporation, for cause of action against the said defendant alleges:

I.

That the defendant now is, and at the time of the grievances hereinafter mentioned was, a corporation doing business in the State of Arizona, to wit, in the County of Yavapai, and was then and there the owner and operated a certain mine, with tunnels, cross-cuts, drifts and stopes in said mine, and that on, to wit, the 19th day of March, 1916, the plaintiff was in the employ of said defendant in said mine upon a certain level of said mine known as the 700-foot level, and the defendant on the day aforesaid then and there also had in its employ certain other servants engaged in the placing and discharging of explosives upon said 700-foot level; and on the day aforesaid the plaintiff was then and there, in the course of his employment, going from one place of said mine on, to wit, said 700-foot level to another

place upon said 700-foot level, and the said defendant by its servants aforesaid then and there had placed upon said 700-foot level, in a hole drilled for that purpose, a large quantity of dynamite, gunpowder or other high explosive, for the purpose and with the intent of discharging the said dynamite or other explosive, and while the said plaintiff was so travelling along and upon said 700-foot level, and while in the exercise of due care for his own safety, the defendant by its said servants aforesaid, negligently and carelessly and without giving any warning of the intended discharge or explosion of said dynamite, gunpowder or explosive, did suddenly [1*]and without notice to the plaintiff discharge the same.

II.

That by said explosion as aforesaid plaintiff was then and there struck with a great quantity of rocks, stones and debris, and buried beneath the same, and thereby the plaintiff sustained severe injuries in that both eyes of the plaintiff were totally destroyed, and the hearing of the plaintiff partially destroyed, and the plaintiff thereby did sustain other and further wounds, injuries, cuts and bruises upon his entire body, especially upon his face and head, and thereby the plaintiff was permanently injured and crippled, and also sustained serious internal injuries, and plaintiff is now and will forever remain totally blind and bereft of hearing, and parts of his body, especially the left side and arm thereof, will forever remain paralyzed; and that by reason of the

*Page-number appearing at foot of page of original certified Transcript of Record.

injuries aforesaid, plaintiff will be wholly unable to ever hereafter pursue any work and labor whatsoever, and will forever remain crippled, sick, sore, lame and disordered to an extent that he will be unable to even look after his own personal wants, and will require the balance of his life constantly a nurse or attendant for his personal wants. By reason of which the plaintiff has sustained damages in the sum of Sixty Thousand Dollars (\$60,000.00),

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Sixty Thousand Dollars (\$60,000.00), and costs herein sustained.

And for a further and separate cause of action against the defendant the plaintiff alleges:

I.

That the defendant now is, and at the time of the grievances hereinafter mentioned was, a corporation doing business in the State of Arizona, to wit, in the County of Yavapai, and on, to wit, the 19th [2] day of March, 1916, was the owner of and then and there operated and worked certain quarries, open pits, open cuts and mines, and then and there on the day aforesaid had in its employ certain servants charged with the duty of placing and discharging dynamite, gunpowder or other high explosives within said mine; and on the day aforesaid the defendant then and there had in its employ the plaintiff working in said quarry, open pit, open cut and mine of the defendant, and more particularly in that part of said mine known as the 700-foot level. And the plaintiff on the day aforesaid while then and there engaged in his said employment suffered personal in-

juries by an accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment, in that while about his said labor, service and employment, and while then and there engaged in the exercise of due care for his own safety, the plaintiff was struck with great force by and was buried beneath a large quantity of rocks, stones, earth and debris as a result of an explosion of dynamite, gunpowder or other high explosive then and there caused by said other servants of said defendant working in and about said mine, and thereby sustained severe personal injuries, in that both eyes of the plaintiff were totally destroyed, his hearing partially destroyed and plaintiff also thereby sustained other wounds, cuts and bruises and serious internal and external injuries, and the flesh upon plaintiff's body and particularly on his face and head was torn, lacerated and wounded, and parts of his body especially the left side and arm thereof will forever remain paralyzed and plaintiff will by reason of said injuries be forever unable to hereafter follow his usual vocation in life or any vocation whatsoever, and will forever remain crippled, paralyzed and maimed, and will ever hereafter require a constant attendant or nurse to administer to his personal wants, and by reason of said injuries did suffer and will forever continue to suffer great physical and mental pain and anguish, and by reason [3] of said premises did sustain damages in the sum of Sixty Thousand Dollars (\$60,000.00).

WHEREFORE the plaintiff prays judgment against the defendant in the sum of Sixty Thousand Dollars (\$60,000.00) and costs herein sustained.

F. C. STRUCKMEYER,
Attorney for Plaintiff.

[Endorsed]: Filed at 3:00 o'clock P. M. Feb. 17, 1917. P. J. Farley, Clerk. By A. L. Jones, Deputy. [4]

In the Superior Court of Yavapai County, State of Arizona.

No. 6739.

Action Brought in the Superior Court of Yavapai County, State of Arizona.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Summons.

The State of Arizona Sends Greeting to United Verde Copper Company, a Corporation.

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the Superior Court of Yavapai County, State of Arizona, and answer the complaint filed with the Clerk of this Court at Prescott, in said county (a copy of which complaint accompanies this Summons), within twenty days (exclusive of the

day of service), after the service upon you of this Summons, if served in this county; in all other cases thirty days, after the service of this Summons upon you (exclusive of the day of service).

And you are hereby notified that if you fail to appear and answer the complaint as above required, plaintiff will take judgment by default against you ———, and judgment for costs and *sibursements* in this behalf expended.

Given under my Hand and Seal of said Court, at Prescott, this 17th day of February, A. D. 1917.

[Seal]

P. J. FARLEY,

Clerk.

A. L. Jones,

Deputy.

By STRUCKMEYER & JENCKES,

Attorneys for Plaintiff.

[Endorsed]: Received Feby. 17th, 1917, at 5:30 o'clock P. M. Jos .F. Young, Sheriff. By J. H. Robinson, Under-Sheriff. [5]

State of Arizona,

County of Yavapai,—ss.

I hereby certify that I received the within Summons on the 17th day of February, 1917, and personally served the same on the 21st day of February, 1917, on LeRoy Anderson, Statutory Agent for United Verde Copper Company, a corporation, they being the defendants named in said Summons, by delivering to LeRoy Anderson, Statutory Agent of the said defendant, personally, in the said County of Yavapai, a copy of Summons and a true copy of the

complaint in the action named in the said Summons, attached to said Summons.

Dated this 21st day of February, 1917.

JOS. F. YOUNG,
Sheriff.

By J. H. Robinson,
Deputy.

Sheriff's Fee, Services	\$1.00
Mileage20

Total, \$1.20

No. 6739. In the Superior Court of Yavapai County, State of Arizona. Nick Kuchan, vs. United Verde Copper Co., a Corporation. Summons. Filed Feby. 24, 1917, at 2 o'clock P. M. P. J. Farley, Clerk. By A. L. Jones, Deputy. [6]

In the Superior Court of Yavapai County, State of Arizona.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order for Removal.

The defendant in the above-entitled action having within the time provided by law filed its petition in due form for the removal of said action to the District Court of the United States for the District of

Arizona, and having at the same time offered a good and sufficient bond as required by law, and said bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States:

NOW, THEREFORE, it is hereby ordered that this action be removed into the District Court of the United States for the District of Arizona, and that all further proceedings in this Court in said action are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in the said United States District Court.

Done this 8th day of March, A. D. 1917.

FRANK O. SMITH,

Judge.

[Endorsed]: Filed at 11 o'clock A. M. this 8th day of Mar., 1917. P. J. Farley, Clerk. By A. L. Jones, Deputy.

[Endorsed]: Certified Copy of Record. Filed Mch. 12, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [7]

*In the District Court of the United States, in and
for the District of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Motion to Require Plaintiff to Elect.

Comes now the above-named defendant and moves the Court to require plaintiff to elect upon which alleged cause of action he relies, namely: Whether one under the common law, or one under the so-called "Employers' Liability Law or Arizona.

That plaintiff has filed a Complaint, first cause of action of which is based upon negligence, as grounds for recovery against defendant; second cause of action of which is based upon the Employers' Liability Law of Arizona, and without negligence on the part of defendant; that said causes of action are based upon the same transaction; that the same are inconsistent, and that defendant requires that plaintiff, at this time, elect upon which cause of action he relies.

LE ROY ANDERSON,
Attorney for Defendant.

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Nick

Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation. Defendant. Motion to Require Plaintiff to Elect. Filed Mch. 16, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [8]

*In the District Court of the United States, in and
for the District of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant,

Demurrer and Answer.

Comes now the defendant above-named, but not waiving its Motion heretofore made, for Answer to the First Cause of Action in said Complaint says that it demurs to the same upon the following grounds, to wit:

I.

That it appears upon the face of said Complaint that plaintiff's injury was occasioned wholly by and proximately resulted from the ordinary and usual risks of the employment in which he was engaged at the time and place thereof, which risks were assumed by him in entering upon and continuing in his said employment.

II.

That it appears from said Complaint that the in-

juries complained of resulted from and were caused by the negligence and improper conduct of plaintiff.

III.

That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

IV.

That said Complaint has commingled therein an alleged cause of action against defendant for negligence, and an alleged cause of action against defendant for liability under the Employers' Liability Law of Arizona.

That there is an attempt to charge two causes of action growing [9] out of the same transaction, and an attempt to hold defendant liable under two different laws for the same thing.

That said Complaint is inconsistent and by reason thereof and the allegations therein, does not state a cause of action, in this, to wit: That in one instance it is alleged that said injuries occurred by the negligence of defendant, and in another that they were occasioned by a condition of his employment.

WHEREFORE, defendant prays judgment as to the sufficiency of said Complaint in the particulars hereinabove specified, and that plaintiff take nothing thereby, and for its costs.

LE ROY ANDERSON,
Attorney for Defendant.

MATTERS IN BAR OF THE ACTION.

Comes now the defendant, and not waiving any of its Motions or Demurrers hereinbefore interposed, says, by way of Matters in Bar of the Action:

I.

That the defendant admits the residence of plaintiff and defendant, but denies each and every, all and singular, the other allegations of said Complaint except as hereinafter specifically admitted.

II.

Admits that on or about the nineteenth day of March, Nineteen Hundred and Sixteen, the plaintiff was in the employ of defendant as a miner.

III.

Admits that on said date said plaintiff was injured, but denies specifically, at the time of said injury said plaintiff was in the exercise of proper care and caution for his own safety.

IV.

Denies specifically that said plaintiff was injured by reason of any negligence and carelessness on the part of defendant, or any of [10] its servants, agents, or employees.

V.

Denies that plaintiff, at the time of his injury, was in the exercise of due care and caution for his own safety. Denies that he was, at that time, in the course of his employment.

VI.

Denies that defendant's servants, negligently and carelessly, and without giving any warning to plaintiff, discharged or exploded dynamite, gunpowder, or other explosive, to the injury of plaintiff, and without notice to him, but alleges the fact to be that at the time of plaintiff's injury that he was not in the discharge of his duties; that he was an experienced

miner and knew that at the time of his injury it was the time, and that he was in the place for blasting; that he went, for his own pleasure, past the place of said blasting, and after due and repeated warnings as to the danger thereof; that if plaintiff had stayed at the place of his employment and had not gone to another part of the mine, for his own pleasure, he would not have been hurt; that if he had obeyed the warnings of defendant's servants, relative to said blasting, he would not have been injured; that if he had observed and remembered the rules for blasting, in vogue in said mine, that he would not have been hurt; that plaintiff was injured solely and wholly by his own fault, and by his failure to exercise for his own protection that degree of care and caution required of him by law.

VII.

Admits that plaintiff was injured at that time, but denies that he was injured to the degree, and in the manner, as set forth in said Complaint.

VIII.

Denies that he is injured to the extent of Sixty Thousand Dollars by reason of the negligence of defendant. [11]

IX.

Defendant alleges that plaintiff was injured by his violation of the rules and regulations of defendant company, promulgated for the safety of himself and his fellow employees, and that his violation of the same was the proximate cause of the injury and would not have occurred but for his violation of the same.

X.

That plaintiff was injured by one of the usual and ordinary risks of his employment, which risk plaintiff assumed upon entering the employment of defendant.

XI.

That notwithstanding the foregoing, and notwithstanding the fact that defendant exercised every reasonable care and caution to protect plaintiff and his fellow-workers, and to promulgate rules and regulations for the safety of plaintiff, and his fellows, defendant, previous to the filing of this suit, tendered to plaintiff Four Thousand Dollars—(\$4,000.00) in full settlement of all claims against it under any law of the State of Arizona, and hereby tenders said Four Thousand Dollars (\$4,000.00) under this Complaint or any cause of action thereof, or any combined cause of action thereof, in full settlement of all claims against it, under any law of the State of Arizona, but not as an admission of any negligence or carelessness, or want of care, on its part, but as a business policy and to share its part of the burdens of hazardous employment, and that it hereby tenders said Four Thousand Dollars (\$4,000.00) in full satisfaction of all such burdens laid upon it by any law or constitutional provision of the State of Arizona.

WHEREFORE, defendant prays that plaintiff take nothing by his said suit, save and except the sum of Four Thousand Dollars (\$4,000.00) hereby tendered.

LE ROY ANDERSON,
Attorney for Defendant. [12]

*In the District Court of the United States, in and
for the District of Arizona.*

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Answer to Second Cause of Action.

PLEA IN ABATEMENT.

Further answering said Complaint, and not waiving any of its Motions, Demurrers or Answers, heretofore made, defendant, for further Answer to the alleged Second Cause of Action of said Complaint, says:

I.

That it appears from the Second Cause of Action of said Complaint that said action is brought under and by virtue of Chapter VI, Title XIV, of the Revised Statutes of Arizona, 1913, and that said law, in that it imposes upon defendant the liability for injuries sustained by plaintiff without fault or negligence on the part of defendant, is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant and other persons similarly situated of their property without due process of law, and denies to the defendant and other persons similarly situated the equal protection of the law.

II.

That it appears that said Act mentioned above was enacted under the mandate of Section 7, Article XVIII of the Arizona Constitution, and that said provision of the Constitution is null and void and in violation of the Fourteenth Amendment to the Constitution of the United States in that it imposes upon defendant and other persons similarly situated, liability for injuries sustained by plaintiff, while said injuries were not in any manner due to or caused by the fault or negligence of this defendant. [13]

III.

That said provision of said Constitution is in further violation of the Fourteenth Amendment to the Constitution of the United States because it deprives this defendant and other persons similarly situated of their property without due process of law and denies to them the equal protection of the law.

WHEREFORE, defendant prays that said action abate, and that plaintiff take nothing by his said Complaint and for its costs.

LE ROY ANDERSON,
Attorney for Defendant.

DEMURRERS.

FURTHER ANSWERING said Second Cause of Action of said Complaint, defendant, by way of demurrers, says:

I.

That it appears upon the face of said Complaint that plaintiff's alleged injury, if any he suffered, was occasioned wholly by and proximately resulted from the ordinary and usual risks of the employment

in which plaintiff was engaged at the time and place thereof, which risks were assumed by plaintiff in entering upon and continuing in his said employment.

II.

That it is not sufficiently alleged or shown by said Complaint that said alleged injury was caused by any accident due to a condition or conditions of plaintiff's employment.

III.

That it appears from said Complaint that the injuries complained of resulted from and were caused by the negligence and improper conduct of plaintiff.

IV.

That it does not appear from the facts alleged in the Complaint that the alleged injuries was not caused by plaintiff's own negligence. [14]

V.

That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

VI.

That said Complaint simply alleges that said accident arose out of and in the course of said employment, and does not allege facts which show such a condition or conditions.

VII.

That it appears upon the face of said Complaint that this action is brought and relief sought under and by virtue of Chapter VI, Title XIV, of the Revised Statutes of Arizona, 1913, commonly known as the Employer's Liability Act. That said Act in that

it imposes upon the defendant, liability for injuries sustained by plaintiff without fault or negligence on the part of defendant is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the law. That said law also violates Section 4, Article 2, and Section 13, Article 2, of the Constitution of the State of Arizona, in that it deprives defendant of property without due process of law and denies to defendant privileges and immunities which are granted to other citizens or class of citizens of the State.

VIII.

That said action appears to have been brought under said Employer's Liability Act, and that said Act was enacted under the mandate of Section 7, Article 18, of the Constitution of the State of Arizona, and that said Act and said Section 7, Article 18, of said Constitution of Arizona, are each null and void and in violation of the Constitution of the United States, Fourteenth Amendment thereof, in that they impose upon this defendant, a liability for injuries sustained by plaintiff, which said injuries are not in any manner due to or caused by the fault [15] or negligence of the defendant, and that said Act and said constitutional provisions attempt to impose liability upon defendant and others similarly situated, without fault or negligence on their part, and are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United

States, because thereby they reprove this defendant and other persons similarly situated of their property without due process of law and deny to defendant the equal protection of the law.

IX.

That the so-called Employer's Liability Law is unconstitutional and void, because of the fact that it is in violation of Sections 5 and 7 of Article 18 of the Constitution of the State of Arizona, in that it attempts to prevent the question of contributory negligence and assumption of risk, as defenses, to be submitted as questions of fact at all times to the jury. That by the Constitution of the State of Arizona, the defenses of contributory negligence and of assumption of risk, are preserved to this defendant and he is entitled to submit the same as questions of fact at all times to the jury, and that said law, in that it attempts to abrogate such defenses, is unconstitutional and void.

X.

That said Complaint alleges as a conclusion that plaintiff was injured by an accident arising out of and in the course of his employment and due to a condition or conditions of such employment, and does not allege facts which show such condition or conditions or the proximate cause of said accident and injury.

XI.

That plaintiff fails to allege, first, that said accident was not caused by his own negligence; or second, facts which show that said accident was not caused by the negligence of plaintiff.

XII.

That plaintiff alleges facts which show an attempt to commingle two causes of action, one under the Employer's Liability Law and one at common law and thereby fails to state any cause of action under either; [16] that said facts are inconsistent and indefinite and fail to state either a cause of action at common law or one under the Employer's Liability Law.

WHEREFORE, defendant prays judgment as to the sufficiency of said Complaint and that plaintiff take nothing thereby, and for its costs.

LE ROY ANDERSON,

Attorney for Defendant.

MATTERS IN BAR OF THE ACTION.

Comes now the defendant and not waiving any of the defenses hereinbefore interposed, says, by way of Matters in Bar of the Action:

I.

That the defendant admits the residence of plaintiff and defendant, but denies generally and specifically, each and every, all and singular, the other allegations of said Complaint except as hereinafter specifically admitted.

II.

Admits that on or about the nineteenth day of March, nineteen hundred and sixteen, the plaintiff was in the employ of defendant as a miner.

III.

Admits that on said date said plaintiff was injured, but denies specifically, at the time of said

injury said plaintiff was in the exercise of proper care and caution for his own safety.

IV.

Defendant denies that it or any of its agents were guilty of negligence, carelessness or improper conduct as to any of the matters set forth in said Complaint, or otherwise, or at all, and denies specifically that said plaintiff was injured by reason of any negligence and carelessness on the part of defendant, or any of its servants, agents, or employees.
[17]

V.

Denies that plaintiff, at the time of his injury, was in the exercise of due care and caution for his own safety. Denies that he was, at that time, in the course of his employment.

VI.

Denies that defendant's servants wantonly, negligently and carelessly, and without giving any warning to plaintiff, discharged or exploded dynamite, gunpowder, or other explosive, to the injury of plaintiff, and without notice to him, but alleges the fact to be that at the time of plaintiff's injury that he was not in the discharge of his duties; that he was an experienced miner and knew that at the time of his injury it was the time, and that he was in the place for blasting; that he went, for his own pleasure, past the place of said blasting, and after due and repeated warnings as to the danger thereof; that if plaintiff had stayed at the place of his employment and had not gone to another part of the mine, for his own pleasure, he would not have been

hurt; that if he had obeyed the warnings of defendant's servants, relative to said blasting, he would not have been injured; that if he had observed and remembered the rules for blasting, in vogue in said mine, that he would not have been hurt; that plaintiff was injured solely and wholly by his own fault, and by his failure to exercise for his own protection that degree of care and caution required of him by law.

VII.

Admits that plaintiff was injured at that time, but denies that he was injured to the degree, and in the manner, as set forth in said Complaint.

VIII.

Denies that he is injured to the extent of Sixty Thousand Dollars by reason of the negligence of defendant. [18]

IX.

Defendant alleges that plaintiff was injured by his violation of the rules and regulations of defendant company, promulgated for the safety of himself and his fellow-employees, and that his violation of the same was the proximate cause of the injury and would not have occurred but for his violation of the same.

X.

That plaintiff was injured by one of the usual and ordinary risks of his employment, which risk plaintiff assumed upon entering the employment of defendant.

XI.

Denies specifically that plaintiff was injured by

an accident which arose out of and in the course of plaintiff's labor, service and employment, and which was due to a condition or conditions of such labor, service, or employment.

XII.

Defendant denies that plaintiff is totally and permanently incapacitated from doing any work and labor, but alleges the fact to be that at the time of said injury plaintiff was taken to defendant's hospital and treated by defendant's surgeons and nurses and given every care and attention and was later sent by defendant, at its expense, to a specialist, who gave plaintiff the benefit of every known treatment, and that plaintiff has partially recovered from said injury, and will not be totally and wholly incapacitated, in the future.

XIII.

That notwithstanding the fact that said accident and injury were occasioned by plaintiff's own fault, and were due to his own negligence, defendant, after said accident, tendered to plaintiff, the sum of Four Thousand Dollars (\$4,000.00); said amount being the maximum amount allowed by the Compensation Law of Arizona for total incapacity. That this amount is hereby tendered, under this Complaint, or any cause of action thereof, or any other law of Arizona, as a full [19] settlement of defendant's obligations to plaintiff, and not in acknowledgment of any liability or fault upon the part of defendant, but as a business policy of defendant, and in full satisfaction of all obligations of defendant, and in full payment of all damages due from it by reason

of said accident, either under the Common Law of Arizona, relative to damages, Employer's Liability Law, or the Workmen's Compulsory Compensation Law of Arizona.

XIV.

That notwithstanding the fact that defendant was not guilty of negligence, which caused said injury, and notwithstanding the fact that plaintiff was guilty of negligence, yet, the law of Arizona provides—that when employees in certain hazardous occupations receive injuries that wholly incapacitate said employees from ever being able to re-engage in labor, in the same or other gainful employment, that the employer shall pay to the employee one-half of his average earnings when at work on full time, previous to the accident, with a proviso that the total amount of such payments shall never exceed Four Thousand Dollars (\$4,000.00) either in the event of the death of the employee, or his total incapacity; that in compliance with said law, previous to the filing of this suit, and after the happening of said accident, defendant tendered to plaintiff, in full satisfaction of all claims under said law, or any other law relative to said accident, as a full discharge of all the burdens imposed by law upon defendant for the happening of said accident to plaintiff while in defendant's employ, and that defendant does hereby so tender said Four Thousand Dollars (\$4,000.00).

WHEREFORE, defendant prays that plaintiff take nothing by his said suit, save and except the

amount herein tendered, to wit: Four Thousand Dollars (\$4,000.00).

LE ROY ANDERSON,
Attorney for Defendant. [20]

[Endorsed]: L-30 (Prescott). In the District Court of the United States, in and for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Demurrer and Answer. Filed Mch. 16, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Law Offices of Le Roy Anderson, Prescott, Arizona, Attorney for Defendant. [21]

*In the United States District Court for the District
of Arizona.*

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—August 16, 1917—Order Sustaining Motion to Require Plaintiff to Elect, etc.

This cause coming on for hearing on the motions heretofore filed herein, the plaintiff being represented by Joseph S. Jenckes, Esquire, and the defendant being represented by Le Roy Anderson, Esquire, the plaintiff withdraws his motion to remand this case to the Superior Court of the State of Arizona, in and for the County of Yavapai.

The cause then coming on for hearing on defendant's motion to require plaintiff to elect upon which alleged cause of action he relies, and the same being duly considered by the Court is by the Court sustained, to which ruling and action of the Court the plaintiff excepts. Thereupon, plaintiff, in open court, elects to stand upon the first cause of action mentioned in his complaint. Thereupon, defendant withdraws its motion to require plaintiff to make his complaint more definite and certain.

The cause then coming on for hearing upon defendant's motion to strike from plaintiff's complaint certain statements, and said motion being duly considered by the Court is by the Court overruled.

Thereupon, by leave of Court, plaintiff strikes from his complaint in line 4 of the first paragraph of the first count on page 2 the word "wantonly." Thereupon, the defendant, in open court, [22] strikes from its answer from the sixth paragraph in line 23 the word "wantonly."

The cause then coming on for hearing upon the demurrer of defendant, and said demurrer being duly considered by the Court is by the Court overruled.

The cause then coming on for hearing upon plaintiff's motion to strike paragraph 11 of defendant's answer, and said motion being duly considered by the Court is by the Court sustained.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—August 21, 1917—Trial.

This cause coming on regularly for trial this day, the plaintiff in person and with F. C. Struckmeyer, Esquire, and Joseph S. Jenckes, Esquire, his counsel, and Le Roy Anderson, Esquire, and James L. Coleman, Esquire, counsel for the defendant, appearing in open court, both sides announce themselves ready for trial.

Thereupon Lincoln H. Beyerle is ordered appointed and sworn as court reporter in this cause, and he is accordingly duly sworn in open court as such court reporter.

The Court thereupon orders the Clerk to call into the jury-box eighteen jurors, and their names are called and, all answering thereto respectively, take their places in the jury-box. Said jurors are thereupon duly sworn upon their *voir dire*. Whereupon, Lloyd L. Day is challenged by the defendant for cause and such challenge denied by the Court. Thereupon, juror B. F. Allen is excused by the Court for cause, and J. T. Hinds is called in his stead and duly sworn on his [23] *voir dire*.

Thereupon, juror John Condit is excused by the Court for cause, and Wm. G. Ellison is called in his

stead and duly sworn on his *voir dire*. All said jurors are found to be duly qualified and are accepted. Thereupon, each side strikes three names from the list, and the remaining twelve on the said list, as follows: Lloyd L. Day, S. W. Hodgson, Ben Doney, W. O. Hoogestraat, C. M. Archer, C. C. Castle, F B. Douglas, Fred L. Bradley, J. S. Kirk, Ralph R. Davis, D. B. Lovell and Wm. G. Ellison, are selected by the clerk and are duly sworn to well and truly try the issue joined between the plaintiff and defendant herein.

Thereupon, the plaintiff, by Joseph S. Jenckes, Esquire, one of his attorneys, reads his complaint and makes his opening statement; and James L. Coleman, Esquire, of counsel for the defendant, reads defendant's answer.

Thereupon, the plaintiff, to maintain upon his part the issue herein, calls Nick Kuchan, Mike Dragich, J. B. McNally and Tom Lesch, who were duly sworn, examined and cross-examined.

The hour of adjournment having arrived, and the trial of this case not being completed, IT IS ORDERED by the Court that the further trial hereof be and the same is hereby adjourned and continued until Wednesday, August 22d, 1917, at the hour of 9:30 o'clock A. M.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—August 22, 1917—Trial.

Trial of this case is this day resumed pursuant to to an order of continuance made on yesterday, plaintiff in person, counsel for both [24] sides, and all jurors, being present in open court.

Mike Dragich is recalled and cross-examined and examined in redirect.

Tom Lesch is recalled and cross-examined.

George Kuchan is called as a witness upon behalf of the plaintiff, and is duly sworn, examined and cross-examined.

Thereupon the plaintiff rests his case.

Thereupon the defendant, by its counsel, moves the Court to instruct the jury to return a verdict for the defendant, which said motion being duly considered by the Court is by the Court denied.

Thereupon, the defendant, to maintain upon his part the issue herein, calls as a witness L. P. Call, who is duly sworn, examined and cross-examined.

Thereupon the defendant rests its case.

Thereupon the defendant, by its counsel, moves the Court to instruct the jury to return a verdict for the defendant, which said motion being duly considered by the Court, is by the Court denied.

There being no further testimony offered and the case being closed, argument of counsel is had; the Court instruct the jury orally, the plaintiff excepting to that part of the Court's instructions to the jury as shown in the reporter's transcript of the testimony for the reasons contained in said transcript, and the defendant excepting to the portions of the

instructions of the Court as shown in the reporter's transcript of the testimony for the reasons therein set out.

Thereupon the jury retire to their room in charge of Joe Delavigne, bailiff, first duly sworn for such purpose, to consider of their verdict. After a time said jury return into court, in charge of their bailiff, and, upon being asked if they had agreed upon a verdict, through their foreman, state that they have agreed. Whereupon said jury, through their foreman, present their verdict, as follows, to wit: [25]

"NICK KUCHAN,

Plaintiff,

against

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at the sum of \$25,000.00 and court costs.

W. O. HOOGESTRAAT,

Foreman."

And the clerk inquiring of said jury if such is their verdict, they state that it is, and so say they all. Thereupon said jury is ordered discharged from the case.

Judgment.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment entered

in favor of the said plaintiff and against said defendant in the sum of \$25,000.00 and the further sum of \$69.60 costs, in accordance with the verdict of the jury.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

**Minutes of Court—October 24, 1917—Order Denying
Motion for New Trial.**

The motion for new trial filed herein by the defendant, having been heretofore argued to the Court by respective counsel, and same having been taken under advisement by the Court, and said motion having been duly considered by the Court, the same is now by the Court denied, to which ruling and action of the Court the defendant excepts.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order Fixing Amount of Supersedeas Bond.

IT IS ORDERED that the appeal bond of the defendant be fixed at \$30,000.00, as per stipulation of

counsel in open court, and that [26] defendant be allowed fifteen days in which to file said bond.

IT IS FURTHER ORDERED, by agreement of counsel, that no execution shall issue herein pending the filing of said appeal bond.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

**Order Extending Time Sixty Days to Prepare, etc.,
Bill of Exceptions.**

IT IS ORDERED that the defendant be and it is hereby granted sixty days from this date in which to prepare and tender its bill of exceptions in this case.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

**Minutes of Court November 6th, 1917—Order
Extending Time to November 18, 1917, to File
Appeal Bond.**

IT IS ORDERED that the time heretofore fixed in which the defendant might file its appeal bond, be

and the same is hereby extended to and including
November 18th, 1917. [27]

*In the District Court of the United States for the
District of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 21st day of August, A. D. 1917, the above-entitled cause came on for trial at Prescott, Arizona, upon the issues joined herein, before the Hon. William H. Sawtelle, a Judge for the District Court of the United States for the District of Arizona, and a jury duly impanelled and sworn. Whereupon the parties respectively offered and introduced the following evidence and exhibits of evidence, and offers of evidence, and the following evidence and offers of evidence were rejected and objections and motions were made and rulings of the Court entered and exceptions duly taken by the parties, all as follows, to wit:

APPEARANCES:

STRUCKMEYER & JENCKES, Esqrs., for the Plaintiff.

ANDERSON, COLEMAN & NILSSON, Esqrs., for the Defendant.

PLAINTIFF'S EVIDENCE IN CHIEF.

Defendant admits American mortality table (3).

Testimony of Nick Kuchan, in His Own Behalf.

NICK KUCHAN, plaintiff, a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. STRUCKMEYER.

My name is Nick Kuchan. I was born in Austria, December 6th, 1885, and was thirty-four years, three months and a half old on March 19th, 1916, the day I got hurt. I stayed in Austria until I was nineteen years old (7) and then went to Quebec, Canada. I was railroading and [28] in the quarry business in Canada until August, 1914, and then went to British Columbia and Vancouver and worked there seven years, splitting stone and anything like that. I was naturalized in Canada and am a British subject (8). I came to the United States, to Seattle, about August 16th, 1914, and then went to Frisco and then to Jerome, Arizona, where I started to work for the United Verde Copper Company September 21st, 1914. I worked for them up to the time I was hurt March 19th. I first worked for them around the metal chutes. I was doing timbering work at the time I got hurt and was getting four and a half or four and a quarter (9). I worked all the time in Canada and in the United States, ex-

(Testimony of Nick Kuchan.)

cept when I was hurt at some place.

On the 19th of March I went to work at 7 o'clock in the evening on the 700 level. I was timbering way back of the station—300-foot shaft. It was way back, pretty near to the end of the mine. It was only about 4 or 500 feet of that drift behind where I was hurt. I was working at the 6-I stope. I worked until 11 o'clock (10). At 11 o'clock the miners go to lunch. Mike Dragich, my partner, was working with me in the 6-I stope; also Tom Lesh and some other men and Ed Isaacson and some other Mexican man and two muckers and two miners down there all together. At lunch-time the miners were going to blast. They had over 40 holes which they put in three or four days. At 11 o'clock they were going to fire their blast.

We went out—it is the old station right close to that 6-I stope, only about five or six walls between there, and we eat lunch right in the old station, and there was water right close about 40 feet from there and we all had lunch buckets and we went out there, everyone after the other, and started out there to get away from the gas and smoke and there is the best place to lunch, we always going that way, and we started out one after the other and walked probably about 150 (11) or 200 feet or something like it, and when we was so far from that place where we were working I saw a pile of muck and *muck and* rubbish, and [29] Mike Dragich was walking ahead of me and so one after the other, and I just kept walking to get by the muck and all I know I

(Testimony of Nick Kuchan.)

lost my consciousness and I never knew what happened to me for several weeks afterward, when I found myself in the hospital.

I was going from the "I" stope about 200 feet to the main raise to eat lunch. I had passed the station. The blast went off 150 or 200 feet on the other side of the station. I could not eat my lunch at the station because there was going to be gas and smoke right close to the stope where we were working. Between the station and the stope is only about 4-foot wall between. I don't know how many men walked with me to eat lunch, but we all went out to the station and took the buckets when we started out (12). I don't know—for all I know only the miners were left there in the stope to light the shots. I believe there were 7 or 8 of us went to eat our lunch. As we walked in the drift over to the place where we were going to eat, nobody warned me or gave me any notice of the explosion or the discharging of dynamite or other explosive.

We had been over at this raise to eat lunch. We go that way when the men blasting the 6-I stope. We had been over to that place about two or three times (13). When the miners were not blasting in the stope we would eat our lunch right close to the station, right close to the stope. I worked in this particular drift or stope from March 6th until March 19th, 13 days. The place where the explosion was was the main drift. I did not know in any way that they were going to fire off explosives in that drift when I passed through or when I was ap-

(Testimony of Nick Kuchan.)

proaching the place. I knew nothing about it. I did not smell or hear any fuse burning or see any fuse burning (14). There were no lights in the drift, because they had the lights off on account of the blasting. We had only miners' carbide lights on our hats. I believe I was unconscious in the hospital several weeks. I stayed in bed about two months. My eyes were entirely gone from the accident. Before that they were good. Before the accident I was [30] healthy, never sick in my life (15) and my hearing was fine, and there was nothing the matter with me. Now, my left ear is crushed; I couldn't hear anything, and the right one is weak. When I hear such things on the street I could hardly hear nothing around me. On my left arm the little finger is dead and the rest I couldn't hardly feel them and I hardly have any grip at all. I couldn't use my left hand very much. When I eat I got to put piece of bread in it and take the other hand and help it up. My left shoulder and arm is dead up here and when I touch myself it is like cramp and like I would sleep on it (16). The left part of my body was in bad condition (17).

Cross-examination by Mr. ANDERSON.

I had worked as a miner before I was hurt about three and a half or four months in this same mine. I was timberman about 13 days, and about two months I was working metal chutes, that is about 6 months altogether working for the United Verde. I knew that they blasted in the mine about 11 o'clock at night and that they set that blast just the

(Testimony of Nick Kuchan.)

time when we eat our lunches. They always set their fuses, or spit them before we went to eat our lunch.

In the stope we were working just before I was hurt the miners in there had set their fuses just before we left (18) and I knew they were going to blast in the stope where I had been working and I knew they were blasting all over the mine at that time, if they had any blasting to do. It was blasting time, when they had to blast, I suppose, all right, at that time. I and the other boys who were working up in the stope came back to the station, the old station,—No. 2 station was right close to that stope where we had our lunch baskets,—6—I stope where we were working. We got our lunch baskets at the station where we generally ate our lunch when they were not blasting. There were 6 or 7 of us around the station, maybe more, as there was 10 of us altogether working in the stope (19), and a miner was left to spit the fuse. I don't know whether some of them wanted to go one way [31] and some another to eat their lunch, because I was second man in the line. I did not notice any discussion about going anywhere else to eat lunch.

I don't know Martin Lazar and never saw him in my life. The explosion was about 150 or 200 feet from where we were working. I did not know that Lazar was drilling up in that drift (20).

“Q. You knew this, that if a man was drilling what he was drilling for, don't you?”

“A. Well, I know that, but I didn't know that

(Testimony of Nick Kuchan.)

somebody was working there because nobody was working before there that I noticed.”

Sure, I would know what he was drilling holes for if I knew he had been working there drilling holes. I knew he would be blasting if at all, about 11 o'clock, if he got through; if he didn't, he would blast, at quitting time. They always blast either at 11 o'clock or at quitting time. The blasting period covers 10 or 15 minutes, that is, they go to where they are going to blast about 20 minutes before lunch and before quitting time and they blast at the same time all over the mine, so that if there is any blasting done at all it is done at about 20 minutes of 11 or 20 minutes of quitting time (21).

We went from the stope to the old station and got our lunch baskets. I didn't have any words about eating at any other place. All of us started out in that drift—some of them probably went over to the cross-cut. I did not notice any other places where some of the others went to eat (22). We all ate at this one place every day before. I didn't see any men working up this main drift at all. Mike Dragich was first and I was second. There was a cross-cut running from the station and in that cross-cut they were not safe at all, because smoke goes right on that cross-cut from the blasting there. The vent (23) comes right from where we go to lunch from the main drift. The station is the big place where the cages go up and down. It was old station—they raised the main shaft and there is a waste chute there. Now they use the [32] raises in the

(Testimony of Nick Kuchan.)

waste chute. From the station there is a drift from the old station, No. 3 and No. 4, but it was too wet and muddy from the water dripping from the roof. There is no place to stay for lunch and that is the reason we go in the main drift where we go before. I don't know any other drifts there except two on the cross-cut about 300 feet away from the old station (24). We were working near the station—a wall about 4 or 5 feet between. From the station to the point where they were blasting was about 200 feet from the old station.

I was hurt up the other drift about 200 feet from the old station, which is close to the 6-I stope. I don't know when before I had been up the drift where I was hurt, because only two or three evenings when the miners put all the holes in the spots and going to blast, and then we was going that way. I had not been up to eat my lunch at this place for a month or so. I was only working 13 days on that stope. I had eaten my lunch about two or three times during that time. I don't know how long before I had been up this drift. I suppose it was about, well, 4 or 5 or 6 times, something like that. I did not see the others blasting where I was hurt (25).

I don't know whether Martin Lazar was on the same shift or not. I didn't know somebody was working there. Jack Cady was my shift boss. He was around there between 9 and 10 that morning. I was hurt at about 11 o'clock at night. We started up to the 800 raise to eat our lunch that night about five minutes before 11. Mike Dragich was ahead of

(Testimony of Nick Kuchan.)

me. When we got along to a certain place I saw some muck there (26). I don't know what it came from because on that drift when I was passing that drift a month or so, I was working that raise on 700 some time before and I was passing there, that main drift come down, caved, and I see that muck there. The explosion took place where the muck was. The air from the ventilator was coming down the drift toward me and toward the station, except some going out through the cross-cut. From the station to the stope most of the ventilation would go down a curve [33] and a cross-cut so there would not be much air ventilation go from the station to the stope. We could have gone up to the 800 raise—that is the main air (27), there is one man-way I know to the 800 level, in that drift in which we were going to eat lunch.

No shift boss or anybody told us to go up the drift to eat our lunch on the 800 raise. That was the only place we could go that we could be safe from gas. It was not part of our work to go there, but I had to go to lunch that way. I went up there to eat my lunch (28), and I had not been working up there at all. It was 400 feet away from where I was working, the man-way from the 800. I know what muck is. The shots put muck out. I didn't know there was muck there from the blasts. I was through the main drift before and most of the time muck was there on the drift from the cave coming down there. I knew muck showed that there had been blasting there, but what can a man do when he comes up in the muck

(Testimony of Nick Kuchan.)

when the shot gets him right there?

I have been in America 16 years. Was born in Austria (29). I have one brother in the Austrian army (30). My parents live in Austria. I don't know how many men were at the station before I went to eat my lunch. There was a few of them come down to the station before I had come down from the stope. I didn't see anybody there except the men working in the stope. Mike was first, then me and then the others. I didn't see other men eating their lunch around the station when I came down (31). There was no water at the 800 raise, but water pretty close to that No. 2 shaft. There was water at the station. I did not see John Koch, Martin Lazar or Domingo at the station. Nobody was eating lunch at the station. The only men that came out of the stope where I had been working was drinking water right close to the station when we was there. I don't know who they was. At the same time, when we all took lunch baskets and started. From the old station up to the 800 raise is between 300 and 400 feet (32). We was intending to go 2—or 300 feet that way, because there was a drift from the main drift where we all stay and eat lunch, and that is the place we stay all the [34] time when we go to lunch there.

When I was hurt I was working as a timberman in the 6—I stope. There was 10 of us working in that stope (33).

Testimony of Mike Dragich, for the Plaintiff.

MIKE DRAGICH, a witness on behalf of plaintiff, being duly sworn, testified as follows:

I have a pool-hall at Jerome, Arizona. I am thirty-seven years old. Before I had the pool-hall I did mining. I followed it about 6 years. I was working on March 19th, 1916, for the United Verde Copper Company at the 6-I stope, on the 700-foot level. I worked for the United Verde from 1910 to March 19th, 1916, the date of this accident (34).

On the date of the accident Nick Kuchan was working with me. We were both timbermen. We had worked about 13 days on the 6-I stope. Kuchan was my partner. We had worked in other places in the mine as partners (35). We usually went to work at 7 in the evening and worked 8 hours, from 7 until 3. We would quit work at 5 or 10 minutes to 11 and have half an hour for lunch, from 11 to 11:30. We were eating on company time. Numerous men were working besides Nick Kuchan and I in the 6-I stope that evening (36), about 8 or 9 men. We ordinarily eat when we quit our work. Wanting to eat our lunch at the 700 station just as we did before. There was miners blasting there and numerous others. I don't know how many there was, and they would say, "You fellows go around over here; we going to blast." The miners at the stope where we was working said that. We took our tools and go to station and took our lunch and went to eat lunch. We did the same as we had done before. We eat the lunch in the station—we can't eat our lunch in the

(Testimony of Mike Dragich.)

station because be smoke there. Of course, great many holes—you know that make smoke and gas. Then we talk among ourselves where we going to eat our lunch. Some of us we go the other way and some of us we go to the 5—I raise, but most of us we said (37), [35] “Well, this best place for us to eat our lunch because nothing be here, there is no smoke and there is not any danger,” and finally we all go outside to go there and eat our lunch and began to walk there.

About 7 or 8 of us start over there to eat our lunch. The station is about 30 feet from the stope. The drift we are walking in going to the place to eat our lunch was a cross-cut, it was drift, cross-cut. It was the main drift. They were running car through. Men going to and from through there. There was blasting one time, but I didn't know it was blasting. I didn't know before that there had been any blasting there. Before we come to this place in the drift I or any of the 6 or 7 in the crowd did not receive any warning that they were going to fire a shot (38). We were walking not very far between us, close together. I was first and Nick Kuchan was next and the rest of us followed. The tunnel is 6 feet high and 6 feet wide. Before I came to the point of the explosion I did not smell or hear any burning fuse. There was no indication of anything to give me notice. If there was I surely go backward, but I can't smell of any kind of odor and can't see any smoke and can't see nothing there. No man there at all to give warning by waiving a hand or talking.

(Testimony of Mike Dragich.)

I did not see burning fuse (39). When we came to the point of the explosion I look at the face of wall. I can see no smoke, no fuse. I look at it and—of course I see man drilling there before—and I look at face and I can't see any indication at all and I continued to walk without any danger—I didn't frighten any at all. Just taking a kinda step you know, and I stop right on top of muck pile. When I come to that spot I get the shot from the face and the shot took me up and threw the headway about 3 or 4 yards. That shot was just sudden—like out of that—I can't distinguish what it was. I landed in the ditch for a second until I got sober and then I started to crawl headway. The explosion came from the side wall. I can't tell this very exactly. [36]

I had work in the mine a long time (40). I knew the purpose of the drilling. At the place where the explosion came out of the wall you can't tell nothing but wall there. Only hole there and one hole there. I do not know what was on the other side of the wall. They had been putting in a raise there. The raise from the 800 up to the 700 (41).

Cross-examination by Mr. ANDERSON.

I had worked for the United Verde about 6 years before this accident. I was mucking about a couple of months and then was a miner. I was quite familiar with the mine and the locations around there. I knew Nick Kuchan. We were working as partners when he was injured. On the date of the injury we were working about 300 feet east of

(Testimony of Mike Dragich.)

the old station. That is where the blasting was to be. At the station we would be about 300 feet from the blasting (42) in 6-I stope. When we were at the station where our lunch baskets were we would be that distance from where the blasting was taking place back in that stope. We was out there about 9 minutes to 11 in the station. They had not blasted yet back in our stope. They had started to spit. About 5 minutes before they went to spitting we left the place. The wall of the stope, which was 30 feet from the station, was the nearest end of the stope to the station. They was blasting about 45 feet back in the stope (43). I came out to the station with Nick and some other men around there, 7 or 8, all of us together. We discussed among ourselves whether we would go to the south and eat our lunch, or whether we would go up to the north to the 800 raise. I decided myself to go to the 800 raise because we ate our supper 3 or 4 times there. Into that place in the 6-I stope we go from there and eat our lunch there. Some of us wanted to go the other way and the majority of us say to go to the 800 raise. That was about 3 or 400 feet to the north (44). We could have gone to the south, and been away from the gas and explosion in our stope if we wanted to. Of course, we were in a hurry because [37] it was late and those fellows want us quit that work and get away. We could have gone to the south down to the other raise there and we would have been away from this gas, but we decided to go to the north.

(Testimony of Mike Dragich.)

I knew Martin Lazar was drilling on this place where the trouble took place. I saw him. He was drilling there about nine o'clock. That was about two hours before the blasting took place. Being an experienced miner I knew what drilling was for. I was awful skillful regarding any shot because I had a great many others on my hands. I led these men—Kuchan was behind me—I was first people.

“Q. And you were looking, watching out to see if there was any blasting there?” (45)

“A. I didn't pay any attention to that at all because everybody there thought it wouldn't be dangerous there at all.”

The best place for us to eat our lunch, that is what we decided on the station. As I approached the place I looked there. I see the muck pile there and at the wall. I can't see any smoke and can't see any odor of powder and can't see burning fuse, can't see nothing and I say, “That is a good place for us to eat lunch?” We passed, continuing our walk. We never looked for any danger or anything like that, nothing at all.

“Q. You took the chance, you went on chance, you knew drilling had been there?”

“A. We took no chance. We say, there, place there for us.”

I don't know if Nick knew or not that Lazarre was working there. I saw him. I was there about nine o'clock. I went in along there and I saw he was drilling there. Nick was in the stope when I was there—because we can't be together all the time.

(Testimony of Mike Dragich.)

I go to look for wedges and blockheads (46).

Our business didn't call us up to the 800 raise. We didn't have to go up there, but we was kinda afraid of the smoke. We went up there because we thought it would be a better place to eat our lunch. Some of the others thought that the drift to the south would be a better [38] place. We could not have gone to the 800 raise without going past the place where Martin Lazar was working (47). Well, we could over there. (Indicating on map.) Over there was the other stope and they was blasting there too. There was a place right there where we could come past. This map seems different than the situation at that time. There was no other stope there. We can't pass there (indicating) (48), you can't pass only this way.

Some of the other men say go this way. That is north or south from the station, I don't know, I can't tell in my mind, you see. We went to the west. As an experienced miner I knew as all other experienced miners do, that the blasting, if it was to be, would be at about 10 minutes to 11 or 10 minutes to 3, along there, covering 10 to 15 minutes time. Some blasted sooner and some later. As an experienced miner, if I was going into another drift from the one in which I was working at that time, I would look out to see whether there was any blasting in there (49). So would any other miner. There were 7 or 8 men on the station when we came out of our stope. There were some others, coming along from the drift. I can't tell exactly how many

(Testimony of Mike Dragich.)

there was. I didn't say anything to Nick about seeing Martin Lazar drilling in this place. I did not see anybody, or say anything to anybody or to any one of these men that were going with me. I didn't give them any warning that Lazar had been drilling there. I don't know if any one else was working with Martin Lazar on this drift toward the 800 raise. He was working alone when I passed through. There was no other work going on there (50) and no other men up that way.

There was no water up there at the 800 raise except copper water—no drinking water. The drinking water was in the station where we left our lunch and that was where we usually ate our lunch. Everybody in the mine knew that we men usually ate our lunch on the station. The reason we did not eat our lunch in the station that night was because we thought the gas would come in there from where they were going to blast. [39] We went up to the 800 to get away from that. Some of the boys wanted to go to the south to get away from it, but I voluntarily selected this place myself. We decided that would be the better place for us. Nobody told us to go up there. Nobody ordered us, no boss or shift boss or otherwise (51). We had no work to do up there. The usual thing was for all of the men working in that stope to eat their lunch on the station.

I don't know whether any of the other men knew Martin Lazar was working up there. I didn't tell any of them. I know what Martin was drilling

(Testimony of Mike Dragich.)

for, sure, I knew he was drilling there because I knew there was a raise there all right. I knew he was drilling a hole in which to blast and I knew, as an experienced miner, that was exactly what was going to happen there. I knew this before I went past there. I went back to my work (52). I knew that was the time they were going to blast, if they blasted. I was the first man in the line yet I didn't say anything to Nick nor to any of the others. I never mentioned it because I never expected to be shot there. I saw him (Lazar) drilling, but if he blasted there must be guarded place. I knew, as an experienced miner, that if I passed a place where a man was drilling at blasting time I should be on the lookout for those things and take precautions for myself. It is a rule in the mine that whenever you know a man was drilling you should not pass his place at blasting time without inquiring and knowing (53). I knew he was drilling there, but I didn't know he was going to blast there. He didn't tell me. Ordinarily I take the precaution to inquire and ask. I knowed spot going to blast there must be guarded place (54). Men were passing. Nobody was working there except Martin Lazar. Martin Lazar was working in the drift by himself and all us men were working over at the east stope.

When we were discussing with Nick and the other miners at the station which way to go to eat lunch we assembled everybody together. There was some fellows, I don't know who they was—we go to the

(Testimony of Mike Dragich.)

south and the [40] other fellows we go west. I said myself, "We got to the 800 raise where we eat our lunch the night before last." That seemed to be the best place for us. I don't remember how Nick voted. I don't know which way he wanted to go. We had eaten lunch at the 800 raise some two nights before, or three (55). I don't know if Nick was with us at that time. There was a couple of muckers and a miner with me; there was four or five of us eat our lunch before. That is the way we chose that place to go there again.

Nick was working with me all the time on the night shift. Sure we could have gone to the south to the other ore raise and gotten out of this smoke. We could have gone around to the 5-K stope and come to the 800 raise. There was two different ways we could have gone from the station and gotten away from the gas. We could go to the south and that cross-cut, and we could go to the 5-K to the main drift and to the station over there, but it was awful far.

There is only one drift to the south (56). The ventilation was the best over there to the 5-Y. When we came out of the stope I didn't see anybody at the station other than the men working with me, except when we started to go over there where we decided to go I saw a man over along the drinking water. He was drinking water or washing his hands, I don't know for sure—I saw him. He was not working with us—not one of the men with us. I

(Testimony of Mike Dragich.)

don't know whether or not his name was John Koch (57).

Redirect Examination.

When I went over there at about nine o'clock and saw Lazar drilling there Kuchan was not with me. I was alone. I went to work at 7 o'clock to the 6—I stope up the drift—south. It was not through the drift in which the explosion afterward took place (58). [41]

Testimony of Dr. J. B. McNally, for Plaintiff.

Dr. J. B. McNALLY, a witness on behalf of plaintiff being first duly sworn, testified as follows:

My name is J. B. McNally. I am a physician and surgeon practicing at Prescott, Arizona. I have practiced for twenty-three years. I know Nick Kuchan and made a physical examination the day before yesterday. His eyes are destroyed. Not only is the vision destroyed, but also the eyeballs and part of the bone (59). His face is injured by powder and small sand. It was healed up leaving quite a bit of scar tissue around. It will leave scars. The left eyeball is mattering. It is a serum or secretion coming from the lacrimary sack and over all the tissues around there that has been injured. His ears, also, have been injured. The eyeball socket will continue to heal with the scar tissue and then it will have to have an opening for secretions to pass out. It may require further operation, but it is uncertain (60). I cannot figure out the possibility of putting in glass eyes. I think

(Testimony of Dr. J. B. McNally.)

a glass eye could be put in the right eye. The left ear is lacerated and the drum destroyed. There is not a total loss of hearing from the use of the right ear if you speak loud to him. The other ear is also injured (61). The ear is slightly lacerated. It may require a little bit further treatment. I think his hearing will always be impaired. I examined his left shoulder. There are a good many small wounds. A perforation of the skin beneath the collar-bone, and another on the anterior part of the shoulder. The locomotion appears to be impaired some. I do not think he is paralytic. I think it is incident to having had a good deal of worry for a long time and incident to the trial here (62).

Cross-examination by Mr. ANDERSON.

In my opinion, with use the left arm will get better all the time. I do not think it is paralyzed (63).
[42]

Testimony of Tom Lesh, for Plaintiff.

TOM LESH, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Tom Lesh. On March 19th, 1916, I was working on the 700 level in the 6-I stope. I had supper before and I saw miners were blasting. I got to go to another place. At 11 o'clock I go with them fellows to eat. Nick Kuchan was with us. Also Mike Dragich. I was fourth in line. Dragich was in front, Nick was next (64), Isaacson was after that and I was after Isaacson. I had worked down there for the company about three

(Testimony of Tom Lesh.)

years. I followed these men. When other fellows were going to blast and I can't stay that place I got to go somewhere (65). When I went up there with the other men there was nobody standing to warn me off. Nobody tell me. I not going to blast (66).

Cross-examination by Mr. ANDERSON.

Mike Dragich did not say anything to me about seeing a man drilling there. Mike was first in line. I never seen nobody—just about 7 or 8 in the line and I was fourth. I was going with them because we got to get away from that stope. Going to blast. I had eaten my lunch before and I had no place to go. I was working in the 6—I stope. When they stopped at the station nobody spoke with me (67). They didn't talk with me about which way they would go. They did not tell me which way they would go to eat their lunch. Mike and Nick and those boys did not discuss where they would go to eat their lunch—we just go together. They all wanted to go to the same place.

I have worked in the mine over three years. I was born in Austria. That night was the first night I knew Nick Kuchan. I never talked with him since the accident or with his attorneys (68). I never talked with Mr. Struckmeyer. Yes, I talked with Mr. Struckmeyer the first time I see him on Sunday here;—that is all I seen of him. [43]

Nobody was working on the station when I got out there. I not know much. I not work out in them places. I could have gone down to the 3-F ore raise and gotten away from the gas. I could

(Testimony of Mike Dragich.)

have gone around to the 5—I stope and gotten away from it there. There is a different way to go to the 800 raise. There is one place there was smoke come up. I don't know the other way to have gone around and up to the 800 raise (69). I generally eat my lunch in No. 3 shaft. They generally ate on the station there where we keep our lunch baskets—that station near the stope—and some miners were blasting and got to eat lunch and go to another place. The idea was simply to get out of the way from the blasting and there was smoke (70).

I knew that was the time for blasting. Nobody tell me about that. I don't know if anybody know or not. I don't know whether they always blast about 11 o'clock all over the level or not. They blast sometimes supper-time—sometimes quitting time. They always blast at either of those two times. They don't shoot any time. They shoot either just before supper-time or just before quitting time (71).

Plaintiff, by his counsel, offers in evidence the American Table of Mortality, showing the life expectancy of a man thirty-four years of age to be thirty-two and one-half years, and showing the life expectancy of a man thirty-six years old to be thirty-one and seven hundredths years, and same is admitted by consent of counsel for defendant (72).

Testimony of Mike Dragich, for Plaintiff (Recalled).

MIKE DRAGICH, a witness on behalf of plaintiff being recalled to the witness-stand for further cross-examination, testified as follows:

(Testimony of Mike Dragich.)

Martin Lazar was drilling lifters at this place with a machine drill. The drill makes a great deal of noise. Kuchan and I were going to the north at the time of the explosion. I was first and he was next. The explosion came out of the right-hand wall (73). The drill holes would be about 3 feet above the floor of the drift. It is a sort of [44] rounding place in there where the drilling was being done, in a sort of a bend around there, caved in there. That little curve was 25 or 30 feet where Martin was. We put in one round before 3 or 4 feet (74) so the curve would be 3 or 4 feet wider at that place. The curve, or extra width, was about 10 feet long up and down the drift. When this shot came off the debris or muck, or rock would have covered a space of 15 or 20 feet on each side as it went out against the other wall.

I was first. None of the rock hit me—it only cut my jumper a little. I was thrown forward headway. I was beyond, or in front of any rock. The man behind Nick told me he was not hit at all. I didn't hear anybody call to turn just before the explosion (75). I didn't hear anybody say a word only we was talking between ourselves when we walk. I didn't hear Nick start to turn to go back from there. I was walking headway. I not turn my head. I stated yesterday that I and the other men were about a yard apart at the time of the explosion. That was what I figured it was at the time of the explosion, but I can't tell exactly. I

(Testimony of Mike Dragich.)

can explain to the jury how Nick was hit on the left shoulder and left ear and left side of the face, by the explosion which came from the right-hand side. When we was walking the shots was on the right hand. When the shots came out I believe hit Nick on the shoulder and hit him on the—hit him against the other wall, then when he fell down he was laying right there and turned his face, you know, and at the same time the other shot came on and that second shot I think blew his eyes out. Of course the first shot can't blow his eyes out, only one, because that shot hit him on one eye and can't blow both eyes out. The second shot must have blown his both eyes out (76).

“Q. Well, now, if he had struck the wall, Mike, it would have simply bruised the arm, there wouldn't have been any of the imbedded rock in it, would there?”

“A. Well, that is—I can't explain very exactly, but so far I could understand how it was.” [45]

I didn't hear anybody calling to Nick and me just before the shot went off. There were 4 or 5 of us together. We were 7 or 8 at the station, but 4 or 5 were together when we were going past the place of the explosion. I see Nick behind me but I can't see all behind, and I see the big tall fellow, Isaacson. Tom Lesh he was there (77). Some of the boys said before we left the station, “We going the other way.”

“Q. And didn't they call to you after you left, don't you recollect that, and that Nick turned and

(Testimony of Mike Dragich.)

started back at the time of the explosion, toward the station?"

"A. After the time of the explosion, they kinder turned back that time."

When the shot threw me I fell into the ditch and I don't know what happened then. They were scared all around, some go back to the station and some go to the 5-K. I was over there in the ditch and Nick was right there under the muck pile. There was one big tall fellow. He was a Swede—his name was Isaacson. I don't know where he is now. He did not turn and call to Nick that time. There were two shots went off, first shot went off and I got scared myself (78). I can't hear nothing from Nick except when the second shot went off. I can't hear. It was calm. You could hear nothing except I heard a man sobbing. That time I was 25 feet or more from Nick—I was in the dark—I can't tell exactly.

I was born in Austria but not in the same part as Nick. We have been friends from the day he come down to work with me. The other boy, Tom Lesh, is from Austria.

The shot and the rock would cover a space of 20 to 25 feet more or less (79). I was not hit by any rock and the man behind Nick told me he was not hit by any rock. Nick was the only one hit (80).

Redirect Examination by Mr. STRUCKMEYER.

Next day after the accident I saw Isaacson and the man supposed to have fired the shot and the man supposed to have been ordered to give [46] the warning. The second day I see this man up in the office

(Testimony of Tom Lesh.)

when somebody was there, Tally. I was asked to tell how it happened. I was asked questions (81).

Recross-examination by Mr. ANDERSON.

I didn't state at that time anything very particular—just what they asked me.

Re-redirect Examination by Mr. STRUCKMEYER.

Those two shots were about two seconds apart (82).

Testimony of Tom Lesh, for Plaintiff (Recalled).

TOM LESH, a witness for plaintiff, being recalled for further cross-examination, testified as follows:

I was behind Nick 4 or 5 feet when the shot went off. Between me and Nick was a Swede, Isaacson is his name. I was not hit—just blowed my hat off. Isaacson was not hit (83).

Testimony of George Kuchan, for Plaintiff.

GEORGE KUCHAN, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. STRUCKMEYER.

My name is George Kuchan. I know a man by name of Isaacson who was present at an accident to Nick Kuchan on the 19th of March. I know him well. I got his address in my possession. He is in Denver, Colorado (84).

Cross-examination by Mr. ANDERSON.

I have known Isaacson was in Denver, Colorado, ever since he was discharged from the United Verde Copper Company at Jerome, which was somewhere

(Testimony of George Kuchan.)

around June 1st of this year, 1917. He went to Denver and maybe he left since that date.

Mr. STRUCKMEYER.—The plaintiff rests. [47]

Whereupon defendant, at the close of plaintiff's case, by motion in writing, moved the Court to give to the jury the following instruction:

"The Court instructs the jury to find the defendant not guilty."

Which motion of the defendant was denied by the Court. To which ruling of the Court defendant, by counsel, then and there duly excepted. (85)

DEFENDANT'S EVIDENCE.

Testimony of Dr. L. P. Kaul, for Defendant.

Dr. L. P. KAUL, a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is L. P. Kaul. I am a physician and surgeon duly licensed in this state. I am in charge of the medical department of the United Verde Copper Company at Jerome. I know Nick Kuchan and first knew him when he was hurt on the 18th or 19th of March (86). I have seen him since that date considerably. We did all we could to make him comfortable as possible until about July, when we sent him to Phoenix to see what further help, if any, could be given him. He returned with little hope held out by the man to whom we sent him, Dr. Martin (87).

Dr. Martin specializes in eye work. Kuchan's condition is as follows: He is totally blind in both eyes, his hearing is very much impaired in his left

(Testimony of Dr. L. P. Kaul.)

ear and the drum is ruptured. The hearing in his right ear may be impaired, though he hears fairly well in that ear. He has some destruction of the molar bones of the cheek and some of the surface of the cheek, and there are some wounds over his left shoulder. Further than that I have no complaint of any kind from him. I have seen him daily. He has gone to his meals up and down the stairs, to his bed and to the hotel. He has been with us from the time he returned from Phoenix July, 1916, until the 3d of August of this year, 1917. I have had no complaint from him about the left arm except of some little disturbance in the fingers (88). [48]

In my opinion he is able to attend to his personal wants absolutely, so far as any blind man could. I have seen him every day about the hospital during this time that I have been there. There is a possibility that the raw surface over the cheek might be healed. We offered to perform the operation and still offer to do it, and we went to Dr. Martin with a proposition to do it. It was not done because the boys felt they wanted the assurance that the healing would be complete and we could not agree to that. It is a more or less delicate operation so far as the result is concerned and we could not guarantee that, so they decided not to have it done (89). We have offered on behalf of the company to perform the operation (90).

Cross-examination by Mr. STRUCKMEYER.

When I say we offered to do it on behalf of the company I meant in the hospital. The hospital is

(Testimony of Dr. L. P. Kaul.)

wholly sustained by contributions of the men, paying a dollar and a half a month each. I did it on behalf of the plaintiff and his coemployees instead of on behalf of the company. I am a general practitioner (91). I do surgery largely. Skin-grafting and dermatology follows in the general line of surgery.

Dr. Martin is a specialist on the eye and ear and does not hold himself out as a surgeon of skin-grafting that I know of. It is not a fact that Kuchan wanted me to send him to California for a specialist so that success could be guaranteed. They wanted me to guarantee a cure (92). I couldn't tell you how many operations I have performed around the sockets of the eye for skin-grafting.

Redirect Examination by Mr. ANDERSON.

The hospital building and equipment is maintained, built and owned by the United Verde Copper Company. The United Verde Company also pays my salary and the salary of three assistants and pay for the equipment there. In return they take from the single men who work there a dollar and a half a month (93). [49]

The United Verde Company has furnished Nick Kuchan all the nursing and his board and room during all this time and have not charged him one penny for it at any time. No expense whatever. The hospital is maintained by the company and by the contributions of the men. The hospital is controlled direct by the company. The company make their deductions from the men of a dollar and a half for single men—two dollars for married men and that

(Testimony of Dr. L. P. Kaul.)

sum is used wholly for the maintenance of the hospital department. Everybody in the hospital is on a salary (94).

Recross-examination by Mr. STRUCKMEYER.

I do not know whether the fund is sufficient to defray all expenses. I have no access to the hospital accounts. I said the only complaint Kuchan ever made (as to his left arm) was his fingers. Lack of sensation frequently follows an injury. It is not paralytic by any means (95). If there was destructions there would be no sensation. Lack of sensation might follow an injury to the nerve cells. There had been no complaint of any kind sufficient to warrant my attention to, or investigation of the cause of this lack of sensation.

Defendant offers in evidence affidavit of counsel for defendant, which was made immediately prior to the trial of the case in order to obtain a continuance of same on the ground that the presence of material witnesses could not be obtained, notwithstanding due diligence on the part of defendant, and as to which affidavit counsel for plaintiff admitted that the witnesses therein named, if personally present, would testify as in said affidavit set forth, and that the same might be read in evidence subject to any objection that might be made as to materiality and relevancy, whereupon the Court denied defendant's motion for a continuance. In the said affidavit it is stated that the witnesses would testify as follows: [50]

“That said Martin Lazar was a miner, working for the defendant at the time of the injury of plaintiff

herein; that said Lazar drilled the hole and placed the shot that caused the explosion complained of by plaintiff; that the plaintiff knew that said Martin Lazar was working in the place where said explosion took place, prior to the explosion, and that there was no other workmen in that particular drift save Martin Lazar; that prior to the said blasting said Lazar's shift boss instructed him at the time of the blasting to give warning that said blast was to take place; that previous to the blasting, said Martin Lazar gave the warning as instructed; that he went to some workmen at the lower end of the drift and asked one of them to warn any workmen coming that way, and particularly the watchman, who might come past where the blasting was to take place; that he instructed Kotch to go in the other direction and to do the same thing, and that he, Lazar himself, went in the third direction; that according to said Lazar's request, said two workmen went in the indicated directions as ordered by said Lazar; that said Lazar will testify that it is the rule and custom in said mine to blast in the neighborhood of eleven o'clock, and that it was well known to all miners working there that this was the hour of blasting; that experienced miners knew this time, and that said experienced miners never went into a drift or stope other than the one they were working in at said times without taking precautions and making inquiries as to the blasting for their own safety; that the said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said

warning; that said fuse from said blast was in plain view to anyone passing and the smoke from same could readily have been seen by anyone approaching; that plaintiff was not called upon in the course of his business to pass past the said place of blasting; that the plaintiff voluntarily passed by the said place of blasting, and there was no occasion for the plaintiff to have done so in the course of his employment; that there were no men called upon to pass said place of [51] blasting in the course of their employment in said mine; that said Lazar was the only man working in said drift, and no other work of any kind was being performed therein; that plaintiff voluntarily passed said place of blasting and not in the course of his business or duties; that defendant can prove by said John Kotch substantially the same as above stated by Lazar, save and except that said Kotch was working in another part of the mine, and that said Lazar came to Kotch and another workman and informed them that he was going to blast, and for each of them to go in different directions to give warning to any other persons; that said Kotch and said other workmen understood said instructions and proceeded to their respective places prior to the blasting; that the said Kotch will testify as to all of the other statements before stated in the testimony of the said Lazar, as to experienced miners; no other workmen in the drift where said explosion took place than Lazar; that plaintiff was not compelled to pass said place in the discharge of his duties; that no other workman was compelled to pass said place in the discharge of his duties; that it is the rule and custom

to blast at that time and that experienced miners all exercised care and caution on their own behalf in going into other places than where they were working at the time of blasting, and that said Lazar gave warning before stated."

Whereupon, plaintiff objected to the following sentence in said affidavit on the ground that it was immaterial and irrelevant, being immaterial as to what instructions were given to other workmen:

"That he went to some workmen at the lower end of the drift and asked one of them to warn any other workmen coming that way, and particularly the watchman who might come past where the blasting was to take place."

Which objection of plaintiff was by the Court sustained. To which ruling of the Court defendant, by counsel, then and there duly excepted. [52]

Plaintiff also objected, on the ground that the same was immaterial and irrelevant, to the following sentence in said affidavit:

"That said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said warning."

Which objection was by the Court sustained. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Whereupon defendant offered to show by said affidavit that the witness would testify to the following facts:

"That he went to some workmen at the lower end of the drift and asked one of them to warn any other

workman coming that way, and particularly the watchman, who might come past where the blasting was to take place.”

Which offer was by the Court denied. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Whereupon defendant offered to show by said affidavit that the witness would testify to the following facts:

“That said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said warning.”

Which offer was by the Court denied. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Thereupon counsel for defendant read in evidence to the jury the following from said affidavit:

“That said Martin Lazar was a miner, working for the defendant at the time of the injury of plaintiff herein; that said Lazar drilled the hole and placed the shot that caused the explosion complained of by plaintiff; that the plaintiff knew that said Martin Lazar was working in the place where said explosion took place, prior to the explosion, and that there was no other workmen in that particular drift save Martin Lazar; that prior to the said blasting said Lazar’s shift boss instructed [53] him at the time of the blasting to give warning that said blast was to take place; that previous to the blasting, said Martin Lazar gave the warning as instructed; that he instructed Kotch to go in the other direction and to

do the same thing, and that he, Lazar himself, went in the third direction; that according to said Lazar's request, said two workmen went in the indicated directions as ordered by said Lazar; that said Lazar will testify that it is the rule and custom in said mine to blast in the neighborhood of eleven o'clock, and that it was well known to all miners working there that this was the hour of blasting; that experienced miners knew this time, and that said experienced miners never went into a drift or stope other than the one they were working in at said times without taking precautions and making inquiries as to the blasting for their own safety; that said fuse from said blast was in plain view to anyone passing and the smoke from same could readily have been seen by anyone approaching; that plaintiff was not called upon in the course of his business to pass past the said place of blasting; that the plaintiff voluntarily passed by the said place of blasting, and there was no occasion for the plaintiff to have done so in the course of his employment; that there were no men called upon to pass said place of blasting in the course of their employment in said mine; that said Lazar was the only man working in said drift, and no other work of any kind was being performed therein; that plaintiff voluntarily passed said place of blasting and not in the course of his business or duties; that defendant can prove by said John Kotch substantially the same as above stated by Lazar, save and except that said Kotch was working in another part of the mine, and that said Lazar came to Kotch and another workman and informed them that he was going to

blast, and for each of them to go in different directions to give warning to any other persons; that said Kotch and said other workmen understood said instructions and proceeded to their respective places prior to the blasting; that the said Kotch will testify as to all of the other statements before stated in [54] the testimony of the said Lazar, as to experienced miners; no other workmen in the drift where said explosion took place than Lazar; that plaintiff was not compelled to pass said place in the discharge of his duties; that no other workman was compelled to pass said place in the discharge of his duties; that it is the rule and custom to blast at that time and that experienced miners all exercised care and caution on their own behalf in going into other places than where they were working at the time of blasting, and that said Lazar gave warning before stated.”

Defendant rests.

Plaintiff rests.

At the close of all the evidence the defendant presented its written Motion asking the Court to instruct the jury to find the defendant not guilty. Which motion was by the Court denied. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Thereupon, Mr. Anderson, counsel for the defendant, in his argument to the jury, stated that notwithstanding he contended there was no negligence on the part of defendant, he was willing that the jury bring in a verdict for seven thousand five hundred dollars (\$7,500.00), but that he was not willing that they bring in a verdict for more than seven thou-

sand five hundred dollars (\$7,500.00) unless the jury believed the defendant was guilty of negligence. That he did not claim in this case that the plaintiff was guilty of contributory negligence.

Whereupon the Court instructed the jury as follows:

Instructions of Court to Jury.

“The COURT.—Gentlemen of the jury, this is an action brought by the plaintiff against the defendant to recover the sum of sixty thousand dollars as damages for an alleged personal injury sustained, or claimed to have been sustained by him while in the employ of the defendant. The complaint has been read in your presence and hearing, as well as the answer, and I deem it unnecessary to again read it. The [55] complaint alleges in substance—and I am merely stating the substance of the complaint and answer to refresh your recollection as to the issues which you would be called to pass upon—I say, the complaint alleges that on or about the 19th day of March, 1916, the plaintiff was employed by the defendant in its mine in Yavapai County, Arizona, upon a certain level of said mine, known as the 700-foot level, and upon which level, on that date, the defendant had there in its employ certain other servants who were engaged in blasting and discharging explosives; that while plaintiff was going from one place upon said 700-foot level to another place upon said 700-foot level, in the course of his employment, and in the exercise of due care for his own safety, a large quantity of dynamite or other high explosive,

which the defendant had then and there placed upon said 700-foot level in a hole drilled for that purpose was, by the defendant, through his servants, negligently, carelessly and without any warning to the plaintiff, suddenly discharged; that as a result of said explosion the plaintiff was struck with a great quantity of rocks, stones and debris and buried beneath the same, whereby he sustained severe injuries in that both of his eyes were totally destroyed and his hearing partially destroyed and his entire body injured and bruised; that the plaintiff was thereupon permanently injured and crippled and would be unable hereafter to pursue any work or labor whatsoever.

The defendant, in its answer, admits that the plaintiff was in its employ, admits that the plaintiff was injured on the said date, but denies that he was injured to the degree and in the manner set forth in the complaint; denies that at the time of said injury plaintiff was in the exercise of proper care and caution for his own safety, or that at the time of said injury he was acting in the course of his employment. The defendant denies that its servants negligently, carelessly and without warning to plaintiff discharged and exploded said dynamite, but [56] alleges that the plaintiff knew at the time of his injury that it was the time and that he was in the place for blasting, and that he went for his own pleasure past the place of said blasting after due and repeated warnings as to the danger there; that the plaintiff was injured solely and wholly by his own fault and by his failure to exercise that degree of

care required of him by law. The defendant further alleges that plaintiff was injured by one of the usual and ordinary risks of employment, which risk the plaintiff assumed when entering the employment of defendant.

Under the admission of counsel in this case representing the defendant, I shall decline to charge you on the question of contributory negligence and the question of assumption of risk.

You are made by the law the sole judges of the facts in this case and the credibility of each and all of the witnesses who have testified in this case, and of the weight that you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility of a witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have shown, and the probability or improbability of the truth of his statement when considered in connection with all the other evidence in the case. When I refer to the testimony of witnesses, I mean to include the plaintiff, who has been examined in this case in his own behalf—who has testified in his own behalf. You are not to disregard the testimony of the plaintiff merely because he is the plaintiff, nor should you disregard the testimony of defendant's witnesses merely because they are in the employ of defendant.

It will be your duty, in arriving at a verdict in this case, to be governed by the evidence in the case and the law as the Court gives it to you, regardless of

the conditions of the parties financially or of [57] the effect of your verdict upon the parties or either of them. It is your imperative duty to try this case and to decide it precisely the same as if it were a case between two individuals and the fact that the plaintiff is an individual and an alien, that is, not a citizen of the United States, and the fact that the defendant is a corporation should make no difference whatever in the consideration of this case. In other words, what you will endeavor to do, what you should endeavor to do is to do justice between these litigants regardless of the consequences. You are to look at the evidence in this case in a common-sense light and to endeavor to arrive at the truth of this transaction as the evidence shows it to be.

Now, I charge you that the burden of proof is upon the plaintiff to establish, by a preponderance of the evidence—I mean the greater weight of the evidence—the material allegations in his complaint, and if he has failed to do so he cannot recover in this action; unless, I say, you accept the statement of counsel for defendant that he is willing for a judgment of seventy-five hundred dollars to be returned against the defendant.

You will observe from the issues stated, from the reading of the complaint, that negligence on the part of the defendant company must be proved and established as the basis of a recovery in this case. This being an action at common law for damages for personal injuries brought by the plaintiff, before he can recover he must prove all of the material allegations of his complaint. He cannot recover under the em-

ployer's liability law or under the workmen's compulsory compensation law, and before he can recover in this action he must prove that the defendant, through its negligence or the negligence of its servants or agents caused his injury, and if you find that this injury complained of was occasioned by any other cause than the company's negligence or that of its servants or employees or agents, then the plaintiff cannot recover in this action. [58]

In determining whether or not the defendant has been guilty of negligence, I charge you that any act of any of the officers or agents or servants of the defendant company, committed within the scope of his or their employment, is the act of the company and the defendant company is responsible for the same, even though such servant was a co-worker or fellow servant with the plaintiff.

Now, by negligence, is meant the want of reasonable or ordinary care which, under the same conditions and circumstances, would be exercised by persons of ordinary prudence and foresight. Negligence is the failure to do what a reasonable and prudent man would ordinarily have done under circumstances existing, or doing what such a person under existing circumstances would not have done. The essence of the failure may lie in omission and commission, the doing or the failure to do, and the duty is dictated and measured by the exigencies of the occasion. Whether negligence exists in any particular state of facts is always a question for the jury and not for the Court. In other words, gentlemen, you are the triers of the facts of the case; the

Court is supposed to give you the law of the case.

You are instructed that the law requires a mining company such as the defendant, before firing charges or explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not given to the plaintiff and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action.

On the other hand, gentlemen, I had intended to charge you of the questions of contributory negligence of the plaintiff or any negligence on his part which may have caused the injury, in other words, any carelessness [59] or negligence which proximately caused the injury, and on the question of assumption of risks, that is, of assuming the ordinary and usual risks incident to the employment, such risks as are open and apparent to the workman, but, in view of counsel's consent that a judgment for seventy-five hundred dollars may be rendered against the company, I have decided not to charge on those two subjects.

As before stated, the burden is upon the plaintiff to prove defendant was guilty of negligence, that is, if the plaintiff recovers more than seventy-five hundred dollars and that negligence caused the injury

complained of. In other words, the burden of proving negligence rests on the party alleging it, and where a party charges negligence on the part of another he must prove the negligence by a preponderance of evidence in the case. If the jury finds that the weight of the evidence is in favor of the defendant or that it is equally balanced, then the plaintiff cannot recover and the jury should find for the defendant, except for this seventy-five hundred dollars just referred to.

Now, if the plaintiff in his case has failed to prove to your satisfaction, by a preponderance of the evidence, that the defendant company was negligent, and that such negligence was the direct and proximate cause of his injuries, then the plaintiff cannot recover, except the seventy-five hundred dollars.

But, if the admission of counsel is adequate to meet your conclusion, then you would go no further in the case. You would be relieved of considering any and all of the issues raised by the pleadings in this case, and you would then return a verdict for the defendant. To repeat a little—it is necessary to do so in view of the changed condition of the case since the evidence closed—I say, if you come to the conclusion that the defendant company was not negligent, that its negligence was not the proximate cause of these injuries which the plaintiff has sustained, then you need not go any farther in the case at all. You stop right there and need not consider the other questions, the measure of [60] damages or anything else. You would just render a verdict in favor of defendant except, as the case now stands,

you may, in any event, render a verdict for the plaintiff in the sum of seventy-five hundred dollars.

Now, in this action I charge you that an employer is not an insurer of the lives of persons in its employ. The law does not require that a corporation or an individual who employs men to work for it shall guarantee or insure their safety or to make a place in which they work absolutely safe. What the law does require of all employers, whether individual or a corporation, is that they shall use ordinary care to furnish a reasonably safe place within which their employees are required to work.

Now, ordinary care and caution depends upon the circumstances of each particular case, and it is such care or caution as a person of ordinary prudence and skill would usually exercise under the same or similar conditions; and if you find from the evidence in this case that the defendant did exercise such ordinary prudence and skill under the circumstances of this case that a person of ordinary prudence and skill would have exercised, then the plaintiff cannot recover in this action, except in the sum of seventy-five hundred dollars, to which counsel consents, and for which you may find a verdict.

Now, notwithstanding that admission, I instruct you that if you find that the plaintiff is entitled to recover in this action, the amount of recovery is for you to determine from all the facts and circumstances in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if he is entitled to more than seventy-five hundred dollars, but it is for you to say, in the exer-

cise of sound discretion, from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor, and without passion or sympathy or prejudice, what amount of money would reasonably compensate this plaintiff for the damage and the injuries which he has sustained. I say, it is for you to determine that. [61]

In the ascertaining of the amount of damages, the law does not lay down any definite, mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment and make such an award of damages as would be a just compensation for this plaintiff's injuries. They should not be inadequate, they should not be excessive.

Now, if you find a verdict for the plaintiff, he is entitled to actual damages only; such damages to be based upon the evidence in the case as reasonable and just compensation for the actual damages sustained by reason of the injury. There can be no damages in the way or in the nature of exemplary, punitive or vindictive damages; that is, you must not render a verdict which is a punishment to this defendant company. You cannot do it as an example to this company or any other company. If you do, you violate the instructions of the Court, and the Court will be compelled to set such a verdict aside, but your verdict must be based upon the evidence in the case as to the actual loss and damage suffered by the plaintiff and, as I said, not as a punitive nor as a penalty, even though you may come to the conclusion that the defendant was very negligent.

Now, you have no right to conjecture, no right to resort to chance or to the field of surmise to arrive at the amount. The amount must be based upon evidence as a fair and a reasonable compensation for the injuries received by the plaintiff.

Now, then, there are some rules which I might suggest to you and which the experience of Courts and jurors have suggested, and that is, that in estimating the plaintiff's damages you will determine whether said injuries described by him and the other witnesses were severe or light, whether they are temporary or permanent, and to what extent, if at all, such injury or injuries have incapacitated him from pursuing his usual occupation of manual labor. If you believe from the evidence that these injuries are permanent and will disable him to labor and earn money in the future, or if you believe that his physical condition [62] has been impaired to labor and earn money in the future, then you may find such a sum as will be a fair compensation for his diminished capacity to labor and earn money in the future. In estimating a probable difference in his earning capacity, you may take into consideration what the plaintiff's income was at and prior to the time of the accident; whether he had been regularly employed; what his income would probably have been had the accident not occurred; how long this income would have lasted in the future; whether he would be steadily employed in the future, and all the contingencies to which his earnings would have been subjected. Some people have an idea that a man in a personal injury case should receive a sum which, put

at interest at a reasonable per cent, would net him an amount equal to the amount he was earning before he received the injuries, but you can readily see that that would not be a correct standard or criterion to follow in personal injury cases, because if you were to allow a man such a sum he would receive, during the balance of his life, a sum the interest of which would be equal to what he had been earning and, at his death, the principal would still be unimpaired. So you see that would be an unfair amount to require a defendant ordinarily to pay.

The testimony in this case shows that the plaintiff, at the time of the injury, was thirty-four years of age, and testimony has been received for the purpose of showing that the probable duration of life of a person thirty-four years of age is thirty-two and a half years. Now, this testimony was based upon the American Table of Mortality, which is framed upon the basis of the average duration of the lives of a great number of persons, but it has been held by the Courts that the rules to be derived from such tables may not be the absolute guides of the judgment and conscience of a jury in a case of this character. It might, however, be considered by you in connection with all the other facts, all the other evidence in the case.

As above stated, if you find in favor of the plaintiff, you should award a fair and reasonable compensation, taking into consideration what [63] the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies as to which it was liable.

Now, in estimating the plaintiff's damages, if you come to the conclusion that he is entitled to damages in excess of the sum of seventy-five hundred dollars, you may also take into consideration the amount of physical pain and suffering, if any, consequent upon the injuries received. If, in considering the amount of damages, you are unable to agree among yourselves as to the amount, you are not to compromise or return a compromise verdict. It is sometimes called a "quotient" verdict. I do not mean by that, when you go to your room if you have different views that you must not endeavor to come together and reconcile your views for the purpose, if possible, to do justice in the premises and to arrive at a verdict. No man should go to the jury-room "with his head set," if you will excuse the expression, but should be at all times willing to listen to his fellow-jurors and to exchange ideas with them and, after exchanging ideas, endeavor to arrive at the truth of the transaction so that justice may be done between the parties.

If you find for the plaintiff in this case under the instructions given you by the Court, find that the plaintiff has sustained damages as set forth in the complaint, or any damages, and has proven damages, then to enable you to estimate the amount of the damages it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but you may, yourselves, make such estimate from all the facts and circumstances in proof and by considering them with your knowledge, observation

and experience in the ordinary, every-day affairs of life.

If, under all the facts in the case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the injuries he has sustained, and have come to the conclusion that it should be more than seventy-five hundred dollars, then you must not render what is known as a "quotient" verdict. That is, you must not add together the different sums which [64] you believe the plaintiff is entitled to and divide by 12 or any other number. Such or any similar method of arriving at the plaintiff's compensation would be unlawful, and the Court would be compelled to set such a verdict aside.

I believe it has been stated to you what effect should be given to the statements offered in evidence by the defendant. The defendant has stated to you what the defendant expected to prove by certain witnesses who are absent. The plaintiff admitted that if such witnesses were present they would testify as set forth in that statement, which was read in your presence and hearing, but the plaintiff does not admit that these facts are true. You will take it just as though those witnesses had appeared on the witness-stand and had given their testimony, and it is for you to determine what the truth of the transaction is.

If there is any dispute as to any particular fact, if the witnesses do not agree, then it is your duty to reconcile the testimony, if you can possibly do so, and, if you cannot, then give credence to the wit-

nesses whom you believe to be credible and worthy of belief.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly empanelled in the above-entitled case, upon our oath do find for the plaintiff and assess his damages at," so much, so many dollars. Insert whatever amount you conclude to award him. You cannot, under the agreement of counsel in this case—you can, but you should not in this case, find a verdict for the defendant, because counsel agree that in any event you may render a verdict against the defendant in favor of the plaintiff in the sum of seventy-five hundred dollars.

The plaintiff may have an exception to the action of the Court in refusing some of plaintiff's requested instructions, and an exception to the giving of certain instructions requested by the defendant. The defendant may have an exception to the action of the Court in giving certain instructions on behalf of plaintiff, and in refusing certain [65] of the requested instructions of defendant. Are there any exceptions on the part of plaintiff to the Court's general instructions?

Mr. STRUCKMEYER.—No, your Honor.

The COURT.—Any exceptions on the part of defendant to the Court's general instructions?

Mr. ANDERSON.—No.

Defendant, by counsel, preserved an exception to the following instruction to the jury requested by plaintiff and given by the Court as above set forth:

"You are instructed that the law requires a mining company such as the defendant, before firing

charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not given, and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action."

And thereupon the jury returned into open Court their written verdict in said case as follows:

"We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at the sum of \$25,000.00 and court costs.

W. O. HOOGESTRAAT,

Foreman."

And thereafter defendant, by counsel, moved the Court for a new trial, which motion was on October 24th, 1917, denied by the Court.

And thereupon, on the 24th of October, 1917, the District Court entered said verdict and then and there rendered final judgment thereon in favor of the plaintiff, Nick Kuchan, and against the defendant, United Verde Copper Company, for the sum of Twenty-five Thousand Dollars [66] (\$25,000.00) and costs; to all of which the said defendant duly excepted at the time and in open court.

And thereupon, on the same day, the Court also

entered of record an order allowing said defendant until fifteen (15) days thereafter to file a bond for Thirty Thousand Dollars (\$30,000.00), and sixty (60) days after October 24th, 1917, in which to present and file its Bill of Exceptions in said cause.

Order Settling Bill of Exceptions.

And the foregoing is all of the evidence given, or received, or offered, or admitted at the trial of this cause; and such proceedings were had, and such objections to evidence, and such offers and refusals of offers of evidence, and such motions and such requests for instructions, and such refusal of instructions requested, and such rulings by the Court were made, and such instructions were given, and such exceptions were taken and saved, at the respective times of the several rulings and actions excepted to as herein indicated in the foregoing pages.

And forasmuch as the matters and things above set forth do not fully appear of record, the said defendant, United Verde Copper Company, presents this, its Bill of Exceptions in said cause, and prays that the same may be signed and sealed and made of record in this cause, by this Honorable Court, pursuant to the law in such cases. Which is accordingly done and ordered by this Court on this 16th day of November, A. D. 1917.

WM. H. SAWTELLE,

Judge of said District Court.

O. K.—ANDERSON, COLEMAN & NILSSON.

By J. L. COLEMAN.

F. C. STRUCKMEYER and

J. S. JENCKES,

Attys. for Pltff. [67]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Bill of Exceptions. Filed Nov. 16, 1917, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. Law Offices of Le Roy Anderson, Prescott, Arizona. [68]

*In the District Court of the United States, for the
District of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

The United Verde Copper Company, a corporation of the State of West Virginia, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the twenty-fourth day of October, nineteen hundred and seventeen, comes now by Anderson, Coleman & Nilsson, its attorneys, and petitions said court for an order allowing said defendant to prosecute a Writ of Error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that

behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals.

And your petitioner will ever pray.

ANDERSON, COLEMAN & NILSSON,

Attorneys for Defendant. [69]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Petition for Writ of Error. Filed Nov. 16, A. D. 1917. Mose Drachman, Clerk. [70]

In the District Court of the United States, for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the defendant, United Verde Copper Company, a corporation of the State of West Virginia, by Anderson, Coleman & Nilsson, its attor-

neys, and in connection with its Petition for a Writ of Error herein, says, that in the record and proceedings during the trial of the above-entitled cause, and in the said judgment in the said District Court, error has intervened to its prejudice, and this defendant here makes the following Assignment of Errors upon which it will rely in the prosecution of the Writ of Error in the above-entitled cause, to wit:

1. The District Court erred in sustaining an objection by counsel for plaintiff, to, and in refusing to admit in evidence, on the ground that the same was irrelevant and immaterial, the following from the evidence of Martin Lazar:

“That he (Martin Lazar) went to some workmen at the lower end of the drift and asked one of them to warn any workmen coming that way, and particularly the watchman who might come past where the blasting was to take place.”

[71]

2. The District Court erred in sustaining an objection by counsel for plaintiff to, and in refusing to admit in evidence, on the ground that the same was irrelevant and immaterial, the following from the evidence of Martin Lazar:

“That said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said warning.”

3. The District Court erred in giving to the jury the following Instruction requested by plaintiff:

“You are instructed that the law requires a mining company such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give, warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not so given, and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action.”

4. The verdict of the jury is contrary to the law.

5. The verdict of the jury is contrary to the evidence.

6. The judgment in said case is contrary to the law.

7. The judgment in said case is contrary to the evidence.

WHEREFORE, said United Verde Copper Company, by reason of the errors aforesaid, prays that said judgment [72] against it, the said United Verde Copper Company, may be reversed, set aside, and held for naught.

ANDERSON, COLEMAN & NILSSON,
Attorneys for Defendant United Verde Copper
Company. [73]

[Endorsed]: No. 30. (Prescott). In the District Court of the United States, for the District of Ari-

zona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Assignment of Errors. Filed Nov. 16th, A. D. 1917. Mose Drachman, Clerk. [74]

*In the District Court of the United States for the
District of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, United Verde Copper Company, a corporation, of the State of West Virginia, as principal, and Walter C. Miller, and R. N. Fredericks, as sureties, of Yavapai County, Arizona, are held and firmly bound unto Nick Kuchan, his heirs, executors and administrators in the full and just sum of Thirty Thousand Dollars (\$30,000.00), lawful money of the United States, to be paid to the said Nick Kuchan, his heirs, executors and administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of November, A. D. 1917.

WHEREAS, lately at a session of the District Court of the United States for the District of Arizona, in a suit pending in said Court between Nick Kuchan, plaintiff, and United Verde Copper Company, defendant, judgment was rendered against said United Verde Copper Company, defendant, and the said defendant, United Verde Copper Company, has obtained from said Court a Writ of Error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment of the District Court in the aforesaid suit, and a citation directed to the said Nick Kuchan, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, within thirty (30) days after the date of said citation;

NOW, the condition of the above obligation is such that, if the United Verde Copper Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

It is expressly agreed by the sureties hereto that, in case of a breach of any condition of this bond, the District Court of the United States for the District of Arizona, may upon notice to said sureties of not less than ten days, proceed summarily in the action or suit in which said Bond is given, to ascertain the amount which such sureties are bound to pay on account of such breach, and render judgment therefor

against them, and award execution therefor.

UNITED STATES COPPER COMPANY,

By ROBT. E. TALLY,

Its Asst. Genl. Mgr.

Principal.

WALTER C. MILLER, (Seal)

R. N. FREDERICKS, (Seal)

Sureties. [75]

State of Arizona,

County of Yavapai,—ss.

On the 13th day of November, 1917, personally appeared before me Walter C. Miller and R. N. Fredericks, respectively, known to me to be the persons described in and who executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Walter C. Miller and R. N. Fredericks, being respectively by me duly sworn, says each for himself, and not one for the other, that he is a resident and householder of the said County of Yavapai, and that he is worth the sum of Thirty Thousand Dollars (\$30,000.00) over and above his just debts and legal liability and property exempt from execution.

WALTER C. MILLER.

R. N. FREDERICKS.

Subscribed and sworn to before me this 13th day of November, A. D. 1917.

[Seal]

M. E. CAHILL,

Notary Public.

My commission expires July 1, 1919.

Approved by Wm. H. Sawtelle, Judge of the United States District Court for the District of Arizona, this November 16th, 1917.

WM. H. SAWTELLE,
Judge.

O. K.—STRUCKMEYER & JENCKES. [76]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, Defendant. Bond. Filed Nov. 16th, 1917, A. D. Mose Drachman, Clerk. [77]

*In the District Court of the United States, for the
District of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error, etc.

Upon motion of Anderson, Coleman & Nilsson, attorneys for defendant, and upon filing a petition for a Writ of Error and Bond on said Writ of Error in the sum of Thirty Thousand Dollars (\$30,000.00), and an Assignment of Errors, it is ordered that a Writ of Error be and the same hereby is allowed to

have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein; and it is further ordered that all further proceedings in this Court be and they hereby are suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit.

WM. H. SAWTELLE,
District Judge.

Dated November 16th, 1917. [78]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Order Allowing Writ of Error and Granting Stay. Filed Nov. 16, 1917. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [79]

*In the United States District Court for the District
of Arizona.*

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff (Defendant in Error),

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant (Plaintiff in Error).

**Certificate of Clerk of United States District Court
to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify the seventy-nine (79) pages, numbered from one (1) to seventy-nine (79), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above-entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in the office of the clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendant, plaintiff in error, for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [80]

Clerk's fee (Sec. 828, R. S. U. S., as Amended
by Sec. 6, Act of March 2d, 1915), for mak-
ing typewritten transcript of record—214
folios at 10 cents per folio.....\$21.40
Certificate and seal to said transcript..... .35

Total.....\$21.75

I hereby certify that the above cost for preparing and certifying record, amounting to \$21.75, has been paid to me by Bullard and Jacobs for Anderson, Coleman & Nilsson, counsel for defendant, plaintiff in error herein.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation in this cause.

WITNESS my hand and the seal of said District Court affixed at my office in Phoenix, Arizona, this 11th day of December, A. D. 1917.

[Seal]

MOSE DRACHMAN,
Clerk.

By Nat. T. McKee,
Deputy Clerk. [81]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Honorable The Judge of the District Court
of the United States, for the District of Arizona,
Greeting:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea which is in

the said District Court before you, between the United Verde Copper Company, a corporation, of the State of West Virginia, plaintiff in error, and Nick Kuchan, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its Complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of San Francisco, California, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within thirty (30) days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct [82] that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United

States, the 16th day of November, A. D. Nineteen Hundred and Seventeen.

MOSE DRACHMAN,

Clerk of the United States District Court for the District of Arizona.

Allowed by:

WM. H. SAWTELLE,

District Judge. [83]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. United Verde Copper Company, a Corporation, Plaintiff in Error, vs. Nick Kuchan, Defendant in Error. Writ of Error. Filed Nov. 16th, A. D. 1917, at ——— M. Mose Drachman, Clerk. By ———, Deputy Clerk. [84]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to Nick Kuchan and Struckmeyer and Jenckes, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Copper Company, a West Virginia corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in

error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, WILLIAM H. SAWTELLE, Judge of the District Court of the United States, for the District of Arizona, this 16th day of November, A. D. Nineteen Hundred and Seventeen.

WM. H. SAWTELLE,
District Judge.

Received a copy of the within and foregoing Citation this 19th day of November, A. D. Nineteen Hundred and Seventeen.

STRUCKMEYER & JENCKES,
Attorneys for Defendant in Error. [85]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. United Verde Copper Company, a Corporation, Plaintiff in Error, vs. Nick Kuchan, Defendant in Error. Citation and Service. Filed Nov. 16, A. D. 1917, at — M. Mose Drachman. By ———, Deputy Clerk. [86]

[Endorsed]: No. 3089. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Copper Company, a West Virginia Corporation, Plaintiff in Error, vs. Nick Kuchan, Defendant in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the District of Arizona.

Filed December 13, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED VERDE COPPER COMPANY,
A Corporation,

Appellant,

vs.

NICK KUCHAN,

Appellee.

Brief of Appellant

G. P. BULLARD,
Phoenix, Arizona,

LEROY ANDERSON,
Prescott, Arizona,
Solicitors for Appellant.



*United States Circuit Court of Appeals for the Ninth
Circuit.*

UNITED VERDE COPPER COMPANY	}
A Corporation,	

Appellant,

vs.

NICK KUCHAN,

Appellee.

STATEMENT OF CASE.

The appellee, Nick Kuchan, is a native of Austria, and at the time of his injury was thirty-four years of age, and an experienced miner. He commenced work for the appellant at Jerome, Yavapai County, Arizona, on September 21, 1914.

On the 19th day of March, 1916, he went to work at seven o'clock in the evening in appellant's mine. He was timbering on the 700 foot level at what is known as the 6—1 stope. Some eight or nine other miners were working in the same locality. At eleven o'clock p. m., which was the customary lunch hour, blasting was to occur at this part of the mine, making it necessary for the appellee and the other miners to leave. Usually they ate their lunch at the old station on the 700 foot level. There was a possibility, however, that the smoke and gas from the blasting in that vicinity would make their customary lunching place untenable, so they decided to go somewhere else.

While the miners were in the old station there was

some discussion among them as to where to go to eat, but appellee and some half dozen others decided to go to the 800 raise because they had lunched there a few times before.

The position they sought to reach was some 300 or 400 feet in a westerly direction. There was another direction which would take them away from the gas and smoke of the 6—1 stope open to them from the old station, but they chose the 800 raise. They walked through a tunnel 6 feet high and 6 feet wide, going in a westerly direction. Mike Dragich led the way, appellee Kuchan second, and the others followed. They came upon a muck pile, and it was at this point that the explosion which injured appellee occurred.

Appellee's injuries sustained from the explosion are the loss of both eyes, total loss of hearing in one ear, and a slight impairment in the other, some destruction of the molar bones of the cheek, and some wounds on the left shoulder.

Martin Lazar, an employee of the appellant company, drilled the hole and placed the shot that caused the explosion which resulted in the appellee's injuries. The explosion occurred at about eleven p. m., which was the usual blasting time throughout the mine, a fact which was common knowledge to all of the miners. Lazar was instructed by his shift boss to give warning. He dispatched some workmen in one direction to warn, instructed one Kotch to go in another direction, and he himself went in a third. Witness Mike Dragich, who walked just ahead of the appellee, knew that Lazar was

drilling in that part of the mine and knew that he would blast in the vicinity of eleven p. m., the blasting hour, but he did not inform appellee, who did not have that knowledge, although he—the appellee—also knew that this was the blasting hour throughout the mine. Nothing connected with his employment called the appellee to the place where the blast occurred, and he was not compelled to pass in that direction to discharge his duties.

In his charge to the Jury the Court made the following instruction:

“You are instructed that the law requires a Mining Company, such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon Mining Companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant, and if you find from the evidence that warning of the intention to fire the charge of explosives which caused the injury to the plaintiff was not given and that the failure to give such warning constituted the approximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in such action.”

(Trans. of Rec. pg. 75, folio 58.)

The Jury returned a verdict in favor of the appellee in the amount of \$25,000.00.

ASSIGNMENT OF ERROR RELIED UPON.

I.

The error relied upon by appellant in this case is based upon the following instruction:

“You are instructed that the law requires a Min-

ing Company, such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon Mining Companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant, and if you find from the evidence that warning of the intention to fire the charge of explosives which caused the injury to plaintiff was not given, and that the failure to give such warning constituted the approximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in such action. (Transcript of record page 75, folio 58.) The giving of which instruction is assigned as error.

ARGUMENT AND AUTHORITIES.

The instruction complained of was based upon subdivision E of section 4071 of the Civil Code of Arizona, which reads as follows:

“Before firing charges warning must be given in every direction from which access may be had to the place where blasting is going on, and mis-fire holes shall be reported to the mine foreman or the shift boss in charge of the locality of such holes. If the shots are fired by electricity, the place must be carefully examined before men are permitted to work therein. The miner in charge shall further instruct those employed in clearing away the loose rock to report to him immediately the finding of any wires in or under the loose rock, and in the event of such being discovered, he shall at once order the work to cease until the wires have been carefully traced to their terminals in order to determine whether a mis-fire has occurred.”

We contend that in giving the instruction complained of the Learned Court did not correctly interpret the law as stated in subdivision E of section 4071,

and that the instruction was therefore highly prejudicial in plaintiff's favor, and in a measure was largely responsible for the verdict for the plaintiff.

The instruction reads, partly, as follows: "The law *requires* a Mining Company, such as defendant, before firing charges of explosives to give warning in every direction from which access may be had to the place where blasting is going on." Further on we find these words: "The failure to give warning *as required by statute* constitutes negligence," etc.

The whole question on this appeal is whether subdivision E, section 4071, which is *the law* referred to, does actually place the duty of giving warning before firing a charge of explosives upon the Mining Company. It is our conviction that it does not; that it places no other duty upon the Mining Company than the ordinary duties which the employer must bear as laid down in the well-known laws of Master and Servant.

To begin with, there are no words in subdivision E of section 4071 which specifically designate the "Mining Company" as the person or company on whom the duty to give warning falls. "Mining Company," or a word or phrase equivalent to or synonymous with it, is not in the paragraph. We cannot believe that this failure to use the said term or its equivalent was an accident, but rather we think it was a deliberate design on the part of the legislators who created the act. Throughout chapter 3 on "Mine Inspector and Operation of Mines," whenever a personal obligation is to be

imposed on the Mining Company, in almost every instance the Mining Company is mentioned specifically. The chapter is full of illustrations which show that the Legislature recognized that in some cases the duty must be fixed definitely on the company, apart from its servants, and that in other cases the duty must be made personal with the servant,—that is to say, an individual duty resting upon the servant as a man.

The two penal sections in the chapter illustrate this. Section 4066 is as follows:

“4066. If any operator shall violate any of the provisions of sections 36, 37 or 38 (Pars. 4088, 4089 or 4090) of this chapter, he shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars and not to exceed five hundred dollars, or imprisonment in the county jail not to exceed one year, or both such fine and imprisonment.”

Section 4091 reads as follows:

“4091. Any person who violates any of the provisions of this chapter where other penalty is not expressly provided shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars or not more than three hundred dollars, or imprisonment in the county jail not less than thirty days or not to exceed one year, or both such fine and imprisonment.”

In section 4066 the punishment is directed at the Mining Company. The Mining Company is especially singled out. In section 4091 the punishment is directed at “any person who violates any of the provisions of this chapter.”

Penal section 4091 certainly recognizes that chapter 3 has laid down duties which are strictly personal to the workmen. We emphasize this now because it shall be our contention throughout this brief that the duty of giving warning imposed in section 4071-E was and is a personal and individual duty of the miner in charge of the operation, and that the failure to carry out this duty would subject the miner to criminal punishment, as provided by the statute. It was not and is not a duty imposed by law upon the Mining Company. Of course, we recognize that the rights and duties of the owner and its servants are closely allied; that the owner is under obligation to be reasonably careful in the selection and instruction of its servants, and is liable for the negligence of its servants acting within the scope of their authority. But we deny that the company is negligent as a matter of statutory law when a servant fails to perform a duty which is personal in its nature.

If the legislature had intended to place the duty in question on the Mining Company, we believe it would have so designated, as it did in many of the sections of the chapter. Section 4053 reads as follows: "The term "'operator' when used in this chapter shall mean the "person, firm, association, company or corporation in "immediate possession of any mine or mining claim, or "accessories thereof, as owner or lessee thereof, and as "such responsible for the management and condition "thereof."

In the following sections the duty is placed upon the operator, and the operator is named:

Section 4064, last line, "And the operator of said
"mine shall obey such order;"

Section 4065, "Whenever loss of life or serious
"accident shall occur in any mine within this State,
"the owner, agent, manager or operator having charge
"of operating such mine shall give notice immediately"
etc.;

Section 4069, "It shall be the duty of the mine
"operator, superintendent or anyone in charge of a
"mine," etc.;

Section 4070, "When considered necessary by the
"mine inspector and so ordered by him, the operator of
"every mine employing ten or more men on the ground
"shall," etc.;

Section 4071, in the middle of subdivision A, "Each
"mine owner shall provide a suitable device for thaw-
"ing or warming powder," etc.;

Section 4073, "It is hereby made the duty of every
"person, company or corporation who shall have," etc.;

Section 4074, G, "It shall be unlawful for the oper-
"ator of any any mine to permit hoisting or lowering of
"men," etc.;

Section 4075, A, "The owners and operators of the
"respective mines shall be responsible for the outlet, or
"part of it," etc.;

Section 4078, D, "It shall not be lawful for any
"operator to impound water," etc.

In the following sections the duty is of necessity
placed upon an individual, who may be an officer of
the company, the owner or any person employed by the

owner, and for violation of the sections penalty is attached which is covered by section 4091 quoted before:

Section 4071, C, reads as follows:

"No person shall, whether working for himself or in the employ of any person, company or corporation, while loading or charging a hole with any blasting powder or other high explosives, use or employ any steel or iron tamping bar; nor shall any mine manager, superintendent, foreman, shift boss, or other person having the management or direction of mine labor, allow or permit the use of such steel, iron or other metal tamping bar by employees under his management or direction."

Section 4074, K:

"No person shall ride upon any cage, skip or bucket that is loaded with tools, timber, powder or other material, except for the purpose of assisting in passing these through the shaft."

Section 4077, B:

"No candles shall be left burning in a mine, or any part of a mine, when the person using the candle departs from his work for the day."

Section 4083:

"No person shall knowingly injure or destroy a water gauge, barometer, air-course, brattice, or other equipment or machinery of any mine; nor, unless lawfully authorized so to do, obstruct or open an air-way, handle or disturb any part of the machinery of the hoisting engine of the mine, open the door of a mine and neglect to close it, endanger the mine or those working therein, disobey an order given in pursuance of law, or do a wilful act whereby the lives or health of persons working in such mine, or the security of a mine, or the machinery connected therewith, may be endangered."

Section 4084:

"Notices shall be placed by the superintendent or under his direction by the mine foreman or shift boss at the entrance of any working place deemed dangerous, and at the entrance to old or abandoned workings, and no person other than those authorized by the operator, manager or superintendent, shall remove or go beyond any caution board or danger signal so placed."

Section 4086, B:

"In mines where a station tender is employed no person shall ring any signal bell except the station tender, except in case of danger or when the main shaft is being sunk."

Section 4090:

"It shall be the duty of the superintendent of every mine within the provisions of this chapter to keep at all times in the office of said mine and in the timekeeper's office thereof, in an accessible place and subject to inspection by all workmen and persons interested in the same, at least one printed copy of this chapter."

It is our position that section 4071, E, makes the duty as personal to the individual doing or refraining from doing the act as any of the preceding sections mentioned. We shall discuss this more in detail later.

It may be argued that many sections do not mention the operator or mine owner by name, and yet the duty is so clearly upon the owner that any other construction would be absurd. That is true, but every such section concerns itself with the employment of men, equipment or devices to be used or provided for use in the mine. Sections in that category are the following: 4071-A , 4072-A-B-D-E-F-H-M-N-O-P-Q-S, 4075,

4076, 4077-A, 4078-C, 4079, 4080, 4081, 4082, 4085, 4086 and 4087. Section 4088 is especially provided for in penal section 4066.

It will be noted that because of the subject matter of the above sections, the servant, as a matter of course, is excluded from any duties. The sections concern themselves chiefly with tools, devices and equipment with which and in which the miner must work, and hence the duty is naturally solely upon the operator of the mine. The question as to whether or not the duty is imposed on the servant cannot arise.

We have discussed many of the sections of the chapter with a view towards finding the intent of the Legislature which created the act, and we believe we have established that whenever (except in cases where the duty of the owner was clearly apparent otherwise) the Legislature wished to fasten a duty specifically on the operator or owner, the operator or owner was named in the section as the one on whom the obligation fell. Let us now scrutinize section 4071, E, by itself.

To begin with, chapter 3 on "Mine Inspector and Operation of Mines" is penal in its nature, and as such should be construed strictly. This is axiomatic law. Therefore no great leeway should be allowed in placing individuals or companies under the scope of the section, unless the section can be reasonably read so as to include them.

Suppose this were an action in which the Mining Company was prosecuted criminally because warning had not been given before firing the charge. In that

case it would be very difficult, if the section were construed strictly, to find the company guilty. We urge that it could not be held to be within the meaning of the section unless one of the owners was actually on the spot in charge of the work, or the company was so grossly negligent in the choice and instruction of its servants that criminal intent on its part must be implied as a matter of law. If the company is not within the purview of the section in a criminal action, it could hardly be said in a civil action that the Mining Company was meant, although not named.

When the Legislature framed chapter 3 on "Mine Inspector and Operation of Mines," it may safely be asserted that the one immediate object it had in view was the passing of a law that would protect as far as possible the miners of the State from accidents in the mines. No doubt every section, paragraph and sentence was framed with that idea uppermost in mind, and the Legislators must have thought that to make the duty strictly personal with the miner engaged in blasting, and to penalize him if he failed in his duty, would be more effective in the procuring of the maximum safety for the miners than to place the duty on an intangible company, on whom the penalty would fall but lightly.

Section 4090 bears this out. That section makes it the duty of the superintendent of every mine to place a copy of chapter 3 in the office of the mine and in the timekeeper's office in an accessible place for the inspection of the *workmen*. It is our belief, and we strongly contend, that the Legislature, in enacting this section,

had chiefly in view the bringing home to the workmen themselves that the onus of care was not all on the owner, but that they had their own personal duties as miners which they owed to their fellow workmen, and that those duties were distinct from the duties of the Mining Company. One of the so-called personal duties most necessary to be continually called to the attention of the miner was the duty to warn before firing the blasting explosive.

A close analysis of section 4071, E, seems to bear out our view on the construction of the paragraph. Beginning in the middle of line 3, we find the following: "Mis-fire holes shall be reported to the mine foreman or shift boss in charge of the locality of such holes." The words quoted certainly impose a duty, for the non-observance of which a penalty is provided in section 4091. Upon whom is that duty imposed? Certainly upon the workman on the job. It is a personal duty with him. It seems to us that it would be unreasonable to say that it was a duty of the Mining Company, for the non-observance of which it could be penalized and made guilty of negligence *per se.*

The next sentence imposes a duty to examine the place carefully before men are permitted again to work there, if the shots are fired by electricity. We think the sentence following explains on whom that obligation falls. The sentence reads: "The miner in charge shall *further* instruct those employed in clearing away the loose rock to report to him immediately the finding of any wires in or under the loose rock, and in the event

“of such being discovered he shall at once order the
 “work to cease until the wires have been carefully
 “traced to their terminals, in order to determine whether
 “a mis-fire has occurred.” To us it seems that the use
 of the word “further” makes it possible to delve straight
 into the minds of the Legislators who wrote paragraph
 E and get their meaning as they intended to convey it.
 Why was the word “further” injected into the sentence?
 The word certainly implies that the miner in charge was
 under duty to give other and previous orders in the
 course of the blasting operation. And it seems ~~un~~reason-
 able to conclude from the striking use of the word that
 the Legislators had in mind that the miner in charge
 should instruct his co-workers on their duties relating to
 the blasting operation from its start to its finish, and that
 therefore the duty was on the miner in charge to in-
 struct them to give warning before firing the blast. In
 other words, the word “further,” used as it is, makes
 the duty to give warning a personal duty of the miner
 in charge. This, in our opinion, is what the Legislators
 intended, and this is the common sense of the matter,
 we verily believe. If this construction is incorrect, then
 the use of the word “further” is entirely superfluous,
 but we cannot believe that the Legislature dropped the
 word into the paragraph by chance. In construing the
 paragraph the word must be given its ordinary and
 reasonable meaning, and, given that meaning, it cer-
 tainly can reasonably be held that the duty was the per-
 sonal obligation of the miner in charge, and not a duty
 of the Mining Company, as stated by the Court to be the
 law in its instructions.

Now, if we have established that the duty mentioned is personal with the miner in charge, then the instruction complained of must be erroneous and a prejudicial error, for which the cause should be remanded for a new trial. The instruction states that to be the law which is not the law, and in such an unqualified way that the Mining Company is deprived of any or all defenses it might have because of a delinquent servant, or for any other reason recognized in the law.

If we are correct in our contention that the duty to give this warning devolved upon the servant and not upon the master, then we would have been entitled to have the questions of fact submitted to the Jury—first, as to whether or not the servant did violate the statute, and, second, was he acting within the scope of his employment when he so violated the statute. (*Knight v. Towles*, 62 N. W., 964.)

It must be conceded that if the duty to give the warning was imposed by the statute upon the servant and not upon the company, then, in such an instance, we would not be responsible for the failure of the servant to give warning if the servant was not acting within the scope of his employment at the time he should have given the warning.

Meecham on Agency, paragraph 745.

Osborne v. McMaster, 41 N. W. 543.

George v. Goebey, 128 Mass. 289.

26 Cyc. 1533. Note 96, 97.

Conder v. Griffith, 111 N. E. 816.

The assumption on the part of the Trial Court that the statutory duty was imposed upon the employer

rather than upon the employee took away from the consideration of the Jury the question of fact as to whether or not the servant violated the statute, and also as to whether or not, if he so violated the statute, he was acting within the scope of his employment at the time he did so.

Even if the duty be found to rest upon the Mining Company, the instruction is nevertheless erroneous and prejudicial error for another reason, namely, because it is too arbitrary and unqualified in defining the negligence arising from the non-performance of the duty in question. We think the instruction should have stated that the failure to warn, as required by the statute, was not such negligence in itself as to make the Mining Company liable, but was evidence of negligence, or, in the light most favorable to the appellee, *prima facie* evidence of negligence on the part of the Mining Company. There is a great deal of authority to the effect that in an action brought to recover damages for an injury sustained by reason of the employer's failure to perform a statutory duty imposed upon him for the benefit of the class of employees to which the injured person belongs, the fact of the duty not having been performed simply constitutes evidence which may be considered by the jury as bearing on the question whether the employer is guilty of actionable negligence.

Armour v. Wanamaker, 202 Fed. 423.

Evans v. American Iron & Tube Co., 42 Fed. 519.

Marino v. Lehmaier, 66 N. E. 572.

Lee v. Sterling Silk Mfg. Co., 101 N. Y. Supp. 78.

- Scialo v. Steffens, 94 N. Y. Supp. 305.
 Kenyon v. Sanford Mfg. Co., 103 N. Y. Supp. 1053.
 Carrigan v. Stillwell, 54 Atl. 389.
 Turner v. Boston & M. R. R. Co., 33 N. E. 520.
 Berdos v. Tremont & Suffolk Mills, 95 N. E. 876.
 Finnegan v. Saml. Winslow Skate Mfg. Co., 76 N. E. 192.
 Keenan v. Edison Elec. Illuminating Co., 34 N. E. 366.
 Sipes v. Michigan Starch Co., 100 N. W. 447.
 Jacobs v. Fuller & Hutsinfuller, 65 N. E. 617.
 Kurchers v. Goodville & Co., 67 N. W. 729.
 Gearing v. Berkson, 111 N. E. 785.
 Amberg v. Kinley, 108 N. E. 830.

The following cases hold that the violation of a statute by a person is only *prima facie* evidence in an action brought by the person injured against the person violating the statute:

- Conder v. Griffith, 111 N. E. 816.
 Taylor v. Ry. Co., Ohio Cir. Ct. N. S. 199.
 Giles v. Diamond State Iron Co., 8 Atl. 368.
 True Co. v. Woda, 66 N. E. 369.
 Maxwell v. Durkin, 57 N. E. 433.
 Acton v. Reed, 93 N. Y. Supp. 911.
 B. & O. v. Young, 54 N. E. 791.
 Chicago & A. R. Ry. Co. v. Hawley, 26 Ill. App. 351.
 Orcutt v. Pacific Coast R. Co., 24 Pac. 661.

There is considerable authority to the effect that a purely penal statute, which provides a specific remedy or punishment, cannot be made the basis for a civil action. This is based on the principle, as stated in Sutherland Statutory Constructions, paragraph 207, that: "When a law imposes a punishment which acts

“upon the offender alone and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended that it should extend further than is expressed, and humanity would require that it should not be so permitted in construction.”

Holwerson v. St. Louis & S. Ry. Co., 57 S. W. 770.

Maker v. Slater Mill & Power Co., 23 Atl. 63.

Bremben v. Jones, 30 Atl. 411.

Louisville & N. R. Co. et al. v. Collier, 54 S. W. 980.

Grant v. Slater Mill & Power Co., 14 R. I. 380.

We state the above principle and cite the cases supporting it to further maintain our contention that it was error to charge the Jury that defendant was negligent as a matter of law because the statute is violated, and to support our argument that section 4071, E, was only evidence, or, at the most, *prima facie* evidence, of negligence on appellant's part, if it can be held that negligence can be charged to appellant because of a violation of said section.

Respectfully submitted,

GEORGE PURDY BULLARD,

Phoenix, Arizona.

LEROY ANDERSON,

Prescott, Arizona.

Solicitors for Appellant,

Dated at Phoenix, Arizona, January 12, 1918.

Service of three copies admitted January 12, 1918.

F. C. STRUCKMEYER,

Solicitor for Appellee,

Phoenix, Arizona.

No. 3089

IN THE
United States
Circuit Court of Appeals 14
For the Ninth Circuit

UNITED VERDE COPPER COM-
PANY, a corporation,

Plaintiff in Error,

vs.

NICK KUCHAN,

Defendant in Error.

Brief of Defendant In Error FILED

FEB 7 - 1918

F. D. MONCKTON

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in Error



ARIZONA STATE PRESS, PHOENIX, ARIZ.

*United States Circuit Court of Appeals, for the Ninth
Circuit.*

UNITED VERDE COPPER COM-
PANY, a corporation,

Plaintiff in Error,

vs.

NICK KUCHAN,

Defendant in Error.

BRIEF
OF
DEFENDENT
IN
ERROR

POINTS AND AUTHORITIES

I.

THE DUTY IMPOSED BY THE ACT IN QUESTION, TO GIVE WARNING IN EACH DIRECTION BEFORE FIRING CHARGES, IS A DUTY IMPOSED UNDER THE POLICE POWER OF THE STATE, AND, THEREFORE, OPERATIVE ALIKE UPON THE OWNER AS UPON THOSE EMPLOYEES IN IMMEDIATE CHARGE OF THE PLACE OF THE INTENDED BLASTING.

TITLE OF ACT, CH. 33, LAWS OF ARIZONA,
1912, R. S.

THOUGH IT BE CONSTRUED AS IMPOSING A DUTY UPON THE EMPLOYEE OR PERSON IN IMMEDIATE CHARGE OF THE PLACE OF SUCH INTENDED BLASTING, IT BEING MANIFESTLY FOR THE PROTECTION OF THE CO-

EMPLOYEES, THE NEGLIGENCE OF SUCH PERSON TO OBSERVE THE DUTY IS IMPUTABLE TO THE EMPLOYER, FOR, THE "FELLOW SERVANT" RULE HAVING BEEN ABROGATED IN THE STATE OF ARIZONA, *RESPONDEAT SUPERIOR* APPLIES, AND IS NEGLIGENCE PER SE OF THE EMPLOYER.

Sec. 4. Art. XVIII Const. of Arizona
5 Labatt Master and Servant Sec. 1909.

III.

THE FAILURE TO GIVE WARNING IS THE ONLY NEGLIGENCE CHARGED IN THE COMPLAINT. THE PLAINTIFF IN ERROR, DURING THE ARGUMENT AT THE TRIAL, CONCEDED ITS LIABILITY AND THIS LIABILITY SHOULD NOT NOW BE QUESTIONED ON APPEAL. THE VERDICT AND JUDGMENT NOT BEING CLAIMED EXCESSIVE DAMAGES, THE APPEAL IS FRIVOLOUS AND MANIFESTLY PROSECUTED FOR DELAY ONLY, AND THE JUDGMENT SHOULD BE AFFIRMED WITH DAMAGES UNDER RULE 30 OF THIS COURT.

ARGUMENT

I.

The Act of the Arizona Legislature under consideration is Chapter 33, Laws of 1912, Regular Session, the

cause of action being based upon the omission of a duty imposed by paragraph (e) of such Act. The title of the Act is a conclusive refutation of the argument advanced by the plaintiff in error; it reads, "An Act relating to the office of mine inspector; * * * regulating the operation and equipment of all mines in the State of Arizona; providing regulations securing the health and safety of workers therein, and providing penalties for violation of the provisions of this Act."

If more be needed than the title of the Act, further argument is found in paragraph (a) of section 19 of the Act, providing:

"All explosives must be stored in a magazine *provided for that purpose* only, etc."

In this paragraph the name "operator," "owner," "employer," or like words are not used, but it is self evident that this duty here commanded of providing a magazine cannot be performed by anyone except the owner.

Likewise, in paragraph (e), the name "owner" is not used, but it is absurd to say that the owner, not being *eo nomine* referred to, is relieved from the responsibility of seeing that such warning is given, by such warning accomplishing that which the Legislature provided for, namely, securing the health and safety of workers in the mines.

Further on, the same paragraph provides:

"If the shots are fired by electricity, the place

must be carefully examined before men are permitted to work therein."

If this section imposes no duty upon the owner or master, I would like to ask who is to extend this permission?

II.

The second point made by the defendant in error would seem to be obvious.

"The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master, is forever abrogated."—Sec. 4, Art. XVIII, Constitution of Arizona.

The court instructed the jury that to give warning was a duty imposed upon mining companies, and that the failure to give such warning constituted negligence on the part of the plaintiff in error. The use of the words "mining companies," if technically incorrect, certainly was not prejudicial if the failure to give such warning was the neglect, *respondeat superior*, of the plaintiff in error.

The failure to give warning was the omission of a statutory duty, enacted under the police power of the state, to secure the health and safety of persons working in mines; and if such neglect stood in causal relation to the injury—was the proximate cause of the injury—then the liability was clearly established, contributory negligence having been expressly withdrawn from the

consideration of the jury by statement of counsel for plaintiff in error.

“Thereupon, Mr. Anderson, counsel for the defendant in his argument to the jury stated that * * * he did not claim in this case that the plaintiff was guilty of contributory negligence.”—Trans. of Rec., p. 69-70.

The argument that such omission was only “evidence” of negligence is devoid of merit, based on a loose or inaccurate use of language by a few appellate courts. If a statutory duty is omitted, this is an omission which, resulting in injury, becomes actionable: negligence. The omission being conceded, or not, controverted, and injury shown, then a question of fact as to the proximate cause of such injury arises, which, attributed to such omission, establishes the liability. Illustration (not original): If the statute requiring a fire escape be ignored, (omission) and a person be burned up (injury) for lack of a fire escape (causal relation), how would it sound to say to a jury that the failure to furnish the fire escape is only some evidence of liability, and that it is for them to say if it be enough?

“The theory under which the breach of a mandatory or prohibitory statute is treated as negligence *per se* in respect of an employee injured by reason of the breach is sustained by a decided preponderance of authority. That this is the correct position can scarcely be doubted. It is submitted that doctrines the essential effect of which is that the qual-

ity of an act which the Legislature has prescribed or forbidden becomes an open question, upon which juries are entitled to express an opinion, are highly anomolous.”—5 Labatt’s Master and Servant, Sec. 1909, p. 5953.

III.

Mr. Anderson, counsel for the plaintiff in error, in his argument to the jury stated that notwithstanding, he contended there was no negligence on the part of the plaintiff in error, he was willing that the jury bring in a verdict for \$7,500.00, but that he was not wiling that they bring in a verdict for more than \$7,500.00, unless the jury believed the plaintiff in error was guilty of negligence. It is impossible to understand the purpose of counsel in signifying his readiness to accept a verdict of \$7,500.00, unless that it was an admission of liability at least to that extent. The answer did not contain an offer to pay this amount as the damage sustained. The case was tried upon the issue: liable or not liable. The only cause of action charged was failure to give warning. This cause of action, at least to the extent of \$7,500.00, was conceded. Apparently, the jury did not deem \$7,500.00 a sufficient compensation for the frightful injuries received by defendant in error. The amount awarded, \$25,000.00, inded is rather low. This court will not permit counsel to “blow hot and cold with the same breath.” Liable or not liable? That was the issue joined and to be submitted to the jury. Will this court

reverse *in toto* where counsel have conceded liability but the jury disagree with him as to the measure of damages? These damages are not, as could not be, claimed to be excessive. Does it not present a case where the plaintiff in error is evidently chagrined at the verdict of the jury, and, therefore, has manifestly prosecuted this appeal for delay? Gentlemen as learned in the law as counsel for plaintiff in error must have, when preparing this appeal, realized the barrenness of their contention.

If the view here taken by counsel for defendant in error impresses itself upon this court, we ask for an affirmance of judgment with damages in conformity with rule 30 of this court.

Respectfully submitted,

F. C. STRUCKMEYER,

J. S. JENCKES,

Attorneys for Defendant
in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

Plaintiff in Error,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Hawaii.

FILED
JAN 11 1918

F. D. [illegible]
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI
PLANTATION COMPANY, LIMITED, PULEHU PLANTA-
TION COMPANY, LIMITED, KULA PLANTATION COM-
PANY, LIMITED, MAKAWAO PLANTATION COMPANY,
LIMITED and KAILUA PLANTATION COMPANY, LIMITED,
Copartners Doing Business Under the Firm Name of MAUI
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Plaintiffs, HAIKU SUGAR COMPANY et al.:

SMITH, WARREN & WHITNEY, Bank of
Hawaii Building, Honolulu, Hawaii,
and

FREAR, PROSSER, ANDERSON & MARX,
Stangenwald Building, Honolulu, Hawaii.

For Defendant, RALPH S. JOHNSTONE, Execu-
tor:

S. C. HUBER, United States District Attorney,
Honolulu, Hawaii,
and

J. J. BANKS, Assistant United States District
Attorney, Honolulu, Hawaii. [1*]

[Endorsed]: In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al. vs. Ralph S. Johnstone, Executor. Application of Clerk of United States District Court for the District and Territory of Hawaii for an Order Extending Time to File Record on Appeal. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. Filed Nov. 19, 1917, at 2 o'clock and 35 minutes P. M. A. E. Harris, Clerk. by (Sgd.) Wm. L. Rosa, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

HAIKU SUGAR COMPANY, PAIA PLANTATION,
KALIANLINUI PLANTATION COMPANY, LIMITED,
PULEHU PLANTATION COMPANY, LIMITED,
KULA PLANTATION COMPANY, LIMITED,
MAKAWAO PLANTATION COMPANY, LIMITED,
and KAILUA PLANTATION COMPANY, LIMITED,
Copartners Doing Business under the Firm Name of MAUI
AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, EXECUTOR Under
the Will and of the Estate of John F. Haley,
Late Collector of Internal Revenue for the
District of the Territory of Hawaii.

**Application of Clerk of United States District Court
for the District and Territory of Hawaii for an
Order Extending Time to File Record on Appeal.**

To the Honorable Presiding Judge of the United
States Circuit Court of Appeals for the Ninth
Circuit:

The undersigned, Albert E. Harris, Clerk of the
United States District Court for the District and
Territory of Hawaii, respectfully represents that in
the above-entitled cause a notice of appeal from the
final decree of said United States District Court in
said cause was filed by the above-named appellants

on the 20th day of October, 1917, and said appeal has since been duly perfected by the filing of a bond on appeal for costs and to stay execution, and said appellants have further filed their assignment of errors on said appeal and have requested the undersigned, as Clerk of said United States District Court, to prepare, certify and file the apostles on appeal in said cause as required by Rules 4 and 5 of the United States Circuit Court of Appeals for the Ninth Circuit in admiralty, on or before the 20th day of November, 1917. [3]

That the undersigned as such Clerk will be unable to prepare and certify the said record on appeal within the time prescribed by statute, by reason of the fact that the transcript of testimony upon the trial of said cause cannot be transcribed within said time by the Court Reporter whose duty it is to make such transcript of testimony, he not having completed the preparation of the transcript on appeal in the above-entitled cause;

WHEREFORE the undersigned respectfully requests that such order of extension be made in said cause by a judge of said United States Circuit Court of Appeals.

Dated, Honolulu, T. H., November 19th, 1917.

[Seal]

A. E. HARRIS,

Clerk of the United States District Court for the District and Territory of Hawaii.

By (Sgd.) Wm. L. Rosa,

Deputy. [4]

[Endorsed]: No. 109. In the District Court of the United States, in and for the District and Territory of Hawaii. In Admiralty. In Rem. Haiku Sugar Company et al. vs. Ralph S. Johnstone, Executor. Order Extending Time to Transmit Record on Appeal. Filed, Nov. 19, 1917, at 2 o'clock and 35 minutes, P. M. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Attorneys at Law, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Attorneys at Law, Stangenwald Bldg., Honolulu, T. H., Attorneys for Plaintiffs. [5]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

IN ADMIRALTY—IN REM.

HAIKU SUGAR COMPANY, PAIA PLANTATION,
KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, EXECUTOR Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Order Extending Time to Transmit Record on Appeal.

Now on this 19th day of November, A. D. 1917, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the transcript of the record on assignment of errors in the above-entitled cause, within the time limited therefor by Admiralty Rule 5 of the United States Circuit Court of Appeals for the Ninth Circuit, it is ordered that the time within which the clerk of this Court shall prepare and transmit said transcript of the record on assignment of errors in this cause, together with the said assignment of errors herein, to the clerk of said United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended to December 20th, 1917.

Dated Honolulu, T. H. November, 19th, 1917.

J. B. POINDEXTER,

Judge, United States District Court for the District
and Territory of Hawaii. [6]

*In the District Court of the United States, in and
for the District and Territory of Hawaii.*

CIVIL No. 109.

HAIKU SUGAR COMPANY et al.,

Plaintiffs,

vs.

RALPH S. JOHNSTONE, Executor,

Defendant.

Statement of Clerk.

TIME OF COMMENCEMENT OF SUIT.

June 20, 1917: Complaint filed.

NAMES OF ORIGINAL PARTIES.

Haiku Sugar Company, Pai Plantation, Kalialinui
Plantation Company, Limited, Pulehu Planta-
tion Company, Limited, Kula Plantation Com-
pany, Limited, Makawao Plantation Company,
Limited, and Kailua Plantation Company, Lim-
ited, copartners doing business under the firm
name of Maui Agricultural Company, Plaintiffs.

Ralph S. Johnstone, Executor, Defendant.

DATES OF FILING OF THE PLEADINGS.

June 20, 1917: Complaint.

July 6, 1917: Demurrer to Complaint.

July 10, 1917: Joinder in Demurrer.

Sept. 28, 1917: Suggestion of Death and Motion of
Substitution, (and Order).

Oct. 12, 1917: Election of Plaintiffs to Stand on
Pleadings.

DECISION.

Oct. 6, 1917: Opinion of Court, by Vaughan, Judge,
Sustaining Demurrer of Plaintiff.

[7]

Oct. 12, 1917: Judgment by Vaughan, Judge, filed
and entered.

DATES OF FILING OF THE PLEADINGS ON
APPEAL.

Oct. 20, 1917: Petition for Writ of Error and Allow-
ance.

Oct. 20, 1917: Writ of Error.

Oct. 20, 1917: Assignment of Errors.

Oct. 20, 1917: Citation.

(Oct. 20, 1917: Bond on Writ of Error.)

United States of America,
Territory of Hawaii,—ss.

I, A. E. Harris, Clerk of the District Court of the United States, for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and the time when the judgment herein was rendered and the judge rendering the same in the cause of Haiku Sugar Company, et al., Plaintiffs, vs. Ralph S. Johnstone, Executor, Defendant, Civil Docket No. 109, in the United States District Court for the Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

this 7th day of December, A. D. 1917.

[Seal]

A. E. HARRIS,

Clerk.

By Wm. L. Rosa,

Deputy. [8]

[Endorsed]: No. 109. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, Plaintiffs, vs. John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, Defendant. Complaint. Filed June 20, 1917, at 10 o'clock and no minutes A. M. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, 205 Bank of Hawaii Building, Honolulu, T. H., Frear, Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [9]

*In the United States District Court for the Territory
of Hawaii.*

No. —.

HAIKU SUGAR COMPANY, PAIA PLANTATION,
KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, Limited, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of
the United States for the District of the Territory of Hawaii,

Defendant.

Complaint.

To the Honorable the United States District Court
for the Territory of Hawaii:

Now come Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, copartners doing business under the firm name of Maui Agricultural Company, hereinabove

named as plaintiffs, and complain of John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, hereinabove named as defendant, and for cause of complaint allege as follows: [10]

I.

That each of the said plaintiffs, Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, is now and at all of the times hereinafter mentioned has been a corporation duly organized, incorporated, existing and doing business under and by virtue of the laws of the Territory of Hawaii.

II.

(1) That the said plaintiffs (hereinafter also referred to as the "partners or members") are and ever since the 1st day of January, 1904, have been copartners engaged in a single business or enterprise, principally in the cultivation of sugar cane and the manufacture of sugar therefrom, under the firm name and style of Maui Agricultural Company (hereinafter also referred to as the "partnership or company") in the county of Maui in the said Territory, but with the principal office of the said partnership or company in the offices of its agent, Alexander & Baldwin, Limited, a corporation duly incorporated and existing under and by virtue of the laws of the said Territory, in the city and county of Honolulu in the said Territory.

(2) That the said partnership or company was formed and ever since the said 1st day of January, 1904, has existed under and by virtue of a certain partnership agreement or indenture of partnership, dated the 30th day of October, 1903, which is still in full force and effect and a full, true and correct copy of which is hereto attached, marked exhibit "A," and hereby made a part [11] hereof; and that the said partnership or company thereafter, to wit, on the 9th day of July, 1904, adopted certain by-laws, which continued in force unchanged until the 14th day of February, 1916, when certain amendments were made therein, and that since then the said by-laws as so amended have continued and are now in force; a full, true and correct copy of which original by-laws and said amendments is hereto attached, marked exhibit "B," and hereby made a part hereof.

(3) That the said partnership or company is and throughout its existence has been and at all times has been intended to be a general partnership; that each of the said partners or members is and throughout the existence of the said partnership or company has been a general partner therein; and that the liability of each of the said partners or members for the debts of the said partnership or company is and throughout the existence of the said partnership or company has been unlimited.

(4) That under the laws of the Territory of Hawaii, and particularly under Act 51 of the Session Laws of 1903 of the said Territory, entitled "An Act Concerning Corporations," approved the 28th

day of April, 1903, and since re-enacted as Sections 2631 and 2632 of the Revised Laws of 1905 and as Sections 3388 and 3389 of the Revised Laws of 1915 of the said Territory, corporations organized and existing under and in conformity with the laws of the said Territory are and ever since the said 28th day of April, 1903, have been authorized to enter into either general or special partnership with each other, and that the said partnership or company, having been formed as a general partnership by the said partners or members acting and intending to act under the authority of said law, was duly registered conformably with the provisions of law applicable [12] to the registration of general partnerships and particularly the provisions of Chapter XXVIII of the Session Laws of Hawaii of 1880, approved the 9th day of August, 1880, entitled "An act to Provide for the registration of Copartnership Firms," since re-enacted as Chapter 162 of the said Revised Laws of 1905 and, with certain amendments, as Chapter 189 of the said Revised Laws of 1915.

(5) That, while under the provisions of the said indenture of partnership the said several partners or members have certain definite shares or interests in the capital or capital assets of the said partnership or company, to wit, the said Paia Plantation an eighteen-thirty-fifths ($18/35$), the said Haiku Sugar Company a twelve-thirty-fifths ($12/35$), and each of the said other partners or members a one-thirty-fifth ($1/35$) share or interest in the said capital or capital assets, and while it is provided in the said

by-laws that the respective interests of the said partners or members shall be evidenced by a certificate, (which provision of the by-laws, however, has never been observed or carried out), no stock or shares of stock or certificate of shares of stock in the said partnership or company has or have ever been issued or (except as to certificates of the respective interests of the said partners or members) been intended to be issued; that it has never been intended that the said partnership or company should have, nor has it ever had, any capital stock as distinguished from capital assets or working capital, nor has the capital of the said partnership or company or any share or interest therein of any of the said partners or members now or ever had any par or face value. That the said respective shares or interests of the said partners or members in the said capital assets or so-called capital stock [13] of the said partnership or company are not now and never have been, and never have been intended to be, capable of being sold, negotiated or transferred in any manner whereby any assignee or transferee thereof might or could succeed to the right of the assignor or transferor to continue in the business of the said partnership or company or to carry on the said business with the other partners or members without their consent; nor has the share or interest of any of the said partners or members in the said partnership or company ever been divisible. That the said capital assets consist mainly of the use, in conjunction with each other, during the existence of the said partnership or company, of all of the several properties, chiefly lands

and water rights, of the said several partners or members, which were contributed and turned over by them respectively to the said partnership or company as required by the said indenture of partnership, for the objects of the said partnership or company, which properties continue in the ownership of the said several partners or members and are to revert back to the said respective partners or members upon the termination of the said partnership or company; and that the said partnership or company was formed in view and by reason of natural and special relations of the said several properties to each other and in view and by reason of identity in large part of the shareholders of the said several and individual corporate partners or members and close and special relations between and among them, and for the purpose of reducing in their mutual interests the cost of operation by co-operative management and by the common use of the railways, lands and water rights of the respective partners or members. [14]

III.

(1) That the said Maui Agricultural Company is not and never has been nor intended to be a corporation, joint stock company or association or insurance company, and particularly that it is not and never has been nor intended to be a corporation, joint stock company or association or insurance company under or within the terms, provisions or meaning of an Act of the Congress of the United States, approved the 5th day of August, 1909, entitled "An Act to Provide Revenue, Equalize Duties and En-

courage the Industries of the United States, and for other Purposes," and more particularly of Section 38 of said last above-mentioned Act, or under or within the terms, provisions or meaning of an Act of the said Congress, approved the 3rd day of October, 1913, entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for other Purposes," and more particularly of Section II of the said last above-mentioned Act, but that, on the contrary, the said Maui Agricultural Company, as a partnership as aforesaid, is without and excluded and excepted from the terms and provisions of the said acts and each of them and from liability or obligation to make returns, be assessed or pay taxes of, upon or in respect of its income or any part thereof under the said terms or provisions;

(2) That, except as hereinafter set forth, the said Maui Agricultural Company has never been requested to make any return or pay any tax or been assessed under the terms or provisions of either of the said last above-mentioned two Acts; and, in the belief that, as a partnership as aforesaid, it was without liability or obligation as aforesaid, it has never, except as hereinafter set forth, made any return or paid any tax under either of said Acts; [15]

(3) That the said Maui Agricultural Company, as a partnership as aforesaid, has at all times been ready and willing to make and forward to the Commissioner of Internal Revenue or to any district collector of internal revenue, when so requested by either of them, a correct statement of its profits to which any or all of its partners or members would

be entitled if the same were divided, whether divided or otherwise, and the names of the individuals or partners or members who would be entitled to the same, if distributed, in conformity and compliance with the provisions of the said Act approved the 3d day of October, 1913, and more particularly the fifth proviso of paragraph D of Section II of the said Act, and that such a statement was so requested of the said Maui Agricultural Company as a partnership in the year 1914 for the year 1913 by the then Collector of Internal Revenue for the District of the Territory of Hawaii, pursuant to the direction of the said Commissioner of Internal Revenue to request such statements from partnerships doing business in the said territory, and that the said Maui Agricultural Company thereupon and forthwith and in compliance with such request made and forwarded such a statement to the said Commissioner as so requested; and

(4) That under the said last above-mentioned two Acts the said several plaintiffs, partners or members of the said Maui Agricultural Company, are and have been liable for corporation excise tax and income tax only in their several individual capacities, and that they have severally heretofore and within the times required by the said Acts respectively, returned for taxation for the years 1909, 1910, 1911, 1912, 1913, 1914 and 1915, respectively, the several and respective shares of the profits [16] of the said Maui Agricultural Company as a partnership as aforesaid for the said years respectively to which they, the said several plaintiffs, as partners or mem-

bers of the said Maui Agricultural Company, would have been respectively entitled if the said profits for the said years respectively had been divided in the said years respectively, whether so divided or otherwise, and have heretofore and for each of the said years 1909 to 1915, both inclusive, been severally and respectively assessed by the said Commissioner of Internal Revenue in respect of the respective shares of profits so returned, and have heretofore and within the times required by the said Acts respectively severally and respectively paid the assessments so made.

IV.

That the said defendant, John F. Haley, is now and at all of the times hereinafter mentioned has been the Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, and a resident of the city and county of Honolulu in the said territory.

V.

That recently, to wit, in the year 1916, the said Commissioner of Internal Revenue and the said Collector took the position that the said Maui Agricultural Company is not and was not subject to the special corporation excise tax under the said Act of the 5th day of August, 1909, for the reason that it, the said Maui Agricultural Company, was not and is not organized as a corporation, joint stock company, or association under the laws of the United States or of any State or Territory of the United States, but that it, the said Maui Agricultural Company, is subject to the income tax under the said Act

of the 3d day of October, 1913, and the further position that the said plaintiffs, partners or members of the said Maui Agricultural Company, are severally subject [17] to the said corporation excise tax for the years 1909 to 1912, both inclusive, and to the said income tax for the years 1913 to 1915, both inclusive, in respect of the shares distributed to and received by them respectively of the net income of the said Maui Agricultural Company in each of the said years as distinguished from their respective shares in the net income of the said Maui Agricultural Company earned and distributable in each of the said years whether distributed or not; and these plaintiffs alleged more particularly that the said Commissioner in, to wit, the month of May, 1916, insistently requested and demanded that the said Maui Agricultural Company prepare and file returns of its annual net income for the years 1913, 1914 and 1915, respectively, in manner and form then stated by the said Commissioner, so as to show a net income of the said Maui Agricultural Company of \$167,906.36 subject to the said income tax and an income tax thereon of \$1,399.22 for the year 1913, and a net income of \$711,308.88 subject to the said income tax and an income tax thereon of \$7,113.04 for the year 1914, and a net income of \$1,858,966.97 subject to the said income tax and an income tax thereon of \$18,589.67 for the year 1915, and that the said Commissioner at the same time that he made such request, stated to and threatened the said Maui Agricultural Company that, unless its returns prepared and filed by it of its net annual income for the said years 1913,

1914 and 1915, respectively, as so requested, should be received by the office of the said Commissioner within sixty (60) days thereafter, it would be necessary for him, the said Commissioner, to prepare such returns and to assess the taxes and penalties upon the said Maui Agricultural Company in respect to its said net income for the said years 1913, 1914, and 1915, respectively, as claimed by him to be provided by law and to take the necessary legal action to [18] assert the specific penalty provided for by the said Section II of the said Act of the 3d day of October, 1913, as for a neglect or refusal of the said Maui Agricultural Company to file returns within the times prescribed by the said last above-mentioned Act.

VI.

That thereupon and within the said sixty (60) days the said Maui Agricultural Company involuntarily, under duress, under protest and in compliance with and by compulsion of the insistent request and demand of the said Commissioner of Internal Revenue and because of the threat of the said Commissioner to exact the penalties, and in order to prevent the exaction of the penalties provided by and referred to in the said Section II of the said Act of the 3d day of October, 1913, prepared and filed with the said Commissioner, in the manner and form so requested and demanded by him, returns of its net income from the said years 1913, 1914 and 1915, respectively, and in the said protest and as grounds thereof and therefor it, the said Maui Agricultural Company, stated and set forth to the said Commis-

sioner, at the same time that it so filed the said returns, that it made the same involuntarily, under duress and in compliance with and by compulsion of such insistent demand and because of such threat and in order to prevent the exaction of such penalties as aforesaid and that it was then and throughout its existence had been a partnership as aforesaid composed of the partners aforesaid, and that as a partnership it is excepted from the provisions of the said Section II of the said Act of the 3d day of October, 1913, and more particularly paragraph G thereof, and that it is not required to make or render any return of its income or profits for taxation or to pay any tax thereon under the provisions of the said last above-mentioned Act and that its several members are liable for income tax only in their individual [19] capacities as aforesaid and have accordingly made their returns, been assessed and paid income taxes as aforesaid for the said years 1913, 1914 and 1915, respectively, and that it, the said Maui Agricultural Company, is not a corporation, joint stock company or association or insurance company but is a partnership within the meaning of the said Section II of the said Act and particularly paragraph G thereof and that the assessment of any tax upon the income or profits of the said Maui Agricultural Company, whether solely or in addition to the taxes assessed and paid by its several members as aforesaid, would be unauthorized and illegal and that any assessment, if made and enforced upon or against the said Maui Agricultural Company upon or in respect of such income or profits, would constitute a

taking of private property for public use without just compensation and would further constitute a taking of the property of the said Maui Agricultural Company without due process of law.

VII.

(1) That thereafter, to wit, on the 5th day of September, 1916, the said John F. Haley, Collector as aforesaid, notified the said Maui Agricultural Company that under the provisions of the said Section II of the said Act of the 3d day of October, 1913, assessments of income taxes amounting to \$2,098.83, \$10,669.56 and \$27,884.51 for the said years 1913, 1914 and 1915, respectively, had been made against it, the said Maui Agricultural Company, by the said Commissioner of Internal Revenue and transmitted to him, the said Collector, for collection, and that each of the said taxes was due and payable by the said Maui Agricultural Company to him, the said Collector, on or before the 15th day of September, 1916, [20] and that the same must be paid to him, the said John F. Haley, Collector as aforesaid, on or before the said last above-mentioned date in order to avoid penalty and interest thereon or in respect thereof.

(2) That the said assessments of income taxes, to wit, the said sums of \$2,098.83, \$10,669.56 and \$27,884.51 are the said sums of \$1,399.22, \$7,113.04 and \$18,589.67, respectively, mentioned in paragraph V of this complaint, together with fifty per cent of each of said last above-mentioned three sums added thereto respectively, which said fifty per cent was added in each instance as an additional tax or penalty

for an alleged neglect of the said Maui Agricultural Company to make lists or returns of its said income for the said years respectively within the times claimed by the said Commissioner to be required by the said Section II of the said Act of the 3d day of October, 1913.

VIII.

That thereafter, to wit, on the 8th day of September, 1916, the said Maui Agricultural Company, involuntarily, under duress, under protest and in compliance with and by compulsion of the insistent requests, demands and threats of the said Commissioner of Internal Revenue and the said Collector and in order to avoid penalties, interest, distraint of its property and other liabilities, hardships and inconveniences, and by necessity of law in order to be entitled to obtain redress and maintain suit to recover the same, did pay to the said John F. Haley, Collector as aforesaid, the said assessments and taxes, to wit, the said sums of \$2,098.83, \$10,669.56 and \$27,884.51, amounting to the sum of \$40,652.90 in the aggregate [21] and in the said last above-mentioned protest and as grounds thereof and therefor the said Maui Agricultural Company stated and set forth in substance the matters and things stated and set forth in its first above-mentioned protest made when it filed its returns as set forth in paragraph VI of this complaint, and at the same time the said Maui Agricultural Company demanded of the said Commissioner and of the said Collector the return and repayment to it, the said Maui Agricultural Company of each of the said sums, amounting

to \$40,652.90 in the aggregate, as illegally taken from it, and further demanded the cancellation of the said assessments made or attempted to be made as aforesaid and of the penalties or additional taxes imposed or attempted to be imposed as aforesaid, failing which the said Maui Agricultural Company at the same time gave notice that it intended to take all appropriate steps and legal proceedings to recover the said sum and to protect its rights in the premises.

IX.

(1) That thereafter, to wit, on the 18th day of September, 1916, the said Maui Agricultural Company duly appealed from the said ruling and decision that it was liable to taxation under the provisions of the said Act approved the 3d day of October, 1913, and from the said assessments made against it for the said years 1913, 1914 and 1915, and from the said imposition of a fifty per cent penalty or additional tax for each of the said years, and submitted its said appeal to the said Commissioner with all the facts and papers in the matter, and at the same time stated to the said Commissioner as the grounds of its said appeal that it is not a corporation, joint stock company or association, but on the contrary is a partnership, within the meaning of the said Act last above-mentioned [22] and as such partnership is excepted by the terms of the said Act from all liability to taxation thereunder and that the said attempted assessments against it and the imposition of any penalties or additional taxes against it and the exaction of the payments aforesaid are unauthorized, illegal and constitute a taking of private

property for public use without just compensation and also constitute a taking of the property of it, the said Maui Agricultural Company, without due process of law; and

(2) That the said Maui Agricultural Company at the same time that it took the said appeal presented to the said Commissioner of Internal Revenue, in accordance with the regulations of, and in the form prescribed therefor by, the Secretary of the Treasury of the United States, formal claims for the refund to it, the said Maui Agricultural Company, of the amounts paid as aforesaid by it as for income taxes and additional taxes or penalties for the said years 1913, 1914 and 1915, respectively, to wit, the said sums of \$2,098.83, \$10,669.56, and \$27,884.51, respectively.

X.

That thereafter, to wit, on or about the 16th day of December, 1916, the said Commissioner of Internal Revenue denied the said appeal and rejected the said claim for the refund of the said taxes and penalties or additional taxes, of which denial of appeal and rejection of claims the said Maui Agricultural Company was notified by the said Collector of Internal Revenue on, to wit, the 4th day of January, 1917.

XI.

That the said taxes and additional taxes or penalties amounting to \$2,098.83, \$10,669.56 and \$27,884.51, respectively, a total of \$40,652.90, and the assessments thereof and the exaction [23] of the payment thereof, and the demand and requirement of returns of the income or profits by the said Maui

Agricultural Company, as aforesaid, were and are illegal and invalid and in violation of the Constitution and of the laws of the United States, and particularly of the provisions of the said Section II of the said Act of the 3d day of October, 1913, and of the rights of the said plaintiffs, and that the said plaintiffs are entitled to recover the said sums and each of them from the said defendant and have observed and performed all provisions and requirements of the laws of the United States and of the rules and regulations prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and all other matters and things necessary or required to be observed or performed on their part to entitle them to recover the same.

WHEREFORE the said plaintiffs pray the judgment of this Court that they recover from the said defendant the said sums of \$2,098.83, \$10,669.56 and \$27,884.51 a total of \$40,652.90, together with interest thereon from the said 8th day of September, 1916, and all of their proper and necessary costs and disbursements herein, and for all other relief to which they may be entitled; and they further pray the process of this Court to cite the said defendant to appear and answer this their complaint.

HAIKU SUGAR COMPANY,

By (S.) J. WATERHOUSE,

Its Treasurer.

(S.) SMITH, WARREN & WHITNEY,

(S.) FREAR, PROSSER, ANDERSON &
MARX,

Attorneys for Plaintiffs. [24]

PAIA PLANTATION,
By (S.) J. WATERHOUSE,
Its Treasurer,
KALIALINUI PLANTATION COMPANY,
LIMITED,
By (S.) J. WATERHOUSE,
Its Treasurer,
PULEHU PLANTATION COMPANY,
LIMITED,
By (S.) J. WATERHOUSE,
Its Treasurer,
KULA PLANTATION COMPANY,
LIMITED,
By (S.) J. WATERHOUSE,
Its Treasurer,
MAKAWAO PLANTATION COMPANY,
LIMITED,
By (S.) J. WATERHOUSE,
Its Treasurer,
KAILUA PLANTATION COMPANY,
LIMITED,
By (S.) J. WATERHOUSE,
Its Treasurer. [25]

United States of America,
District of Hawaii,—ss.

John Waterhouse, being first duly sworn according to law, deposes and says that he is the acting manager of Alexander & Baldwin, Limited, mentioned in the foregoing complaint, and the treasurer of the Maui Agricultural Company and of each of the plaintiffs named in the said complaint; that he has read the said complaint and knows the contents thereof

and that the facts stated therein are true to the best of his knowledge and belief.

(S.) JOHN WATERHOUSE.

Subscribed and sworn to before me this 20 day of June, 1917.

[Notarial Seal] (S.) DAVID L. OLESON,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [26]

PARTNERSHIP AGREEMENT

And

BY-LAWS

of the

Maui Agricultural Company.

Revised Feby. 14/16.
to ~~December 31st, 1912.~~

Printed by
Honolulu Star-Bulletin
Merchant Street
1913.

Exhibit "A."**PARTNERSHIP AGREEMENT**

Between the seven companies
forming the

MAUI AGRICULTURAL COMPANY

(Dated October 30, 1903.)

THIS INDENTURE OF PARTNERSHIP
made this thirtieth day of October, A. D. 1903, by
and between:

The HAIKU SUGAR COMPANY, hereinafter
referred to and called "HAIKU," Party of the
First Part;

The PAIA PLANTATION, hereinafter referred
to and called "PAIA," Party of the Second Part;

The KALIALINUI PLANTATION COM-
PANY, LIMITED, hereinafter referred to and
called "KALIALINUI," Party of the Third Part;

The PULEHU PLANTATION COMPANY,
LIMITED, hereinafter referred to and called
"PULEHU," Party of the Fourth Part;

The KULA PLANTATION COMPANY, LIM-
ITED, hereinafter referred to and called "KULA,"
Party of the Fifth Part;

The MAKAWAO PLANTATION COMPANY,
LIMITED, hereinafter referred to and called
"MAKAWOA," Party of the Sixth Part;

The KAILUA PLANTATION COMPANY,
LIMITED, hereinafter referred to and called
"KAILUA," Party of the Seventh Part;

All of said parties being corporations duly incorporated and existing under and by virtue of the laws of the Territory of Hawaii,

WITNESSETH:

WHEREAS, the parties hereto are the owners respectively of certain land and water rights and personal property hereinafter more particularly described, and located upon the Island of Maui, in said Territory, which said rights and property, owing to the location and situation thereof can be more profitably and advantageously operated in common than by each party hereto separately;

AND WHEREAS, the parties hereto have mutually agreed each with the other to enter into partnership, for the period and for the purposes and upon the terms and conditions hereinafter set forth;

NOW THEREFORE, in consideration of the premises, and of the mutual covenants and agreements by and between the parties hereto, hereinafter contained, and of the sum of ten dollars (\$10.00) to each of the parties hereto paid by the other parties hereto, the several receipt whereof is hereby ~~severally~~ acknowledged, each of the parties hereto doth hereby covenant, promise and agree, with each of the other parties hereto, as follows:

OBJECTS OF COPARTNERSHIP.

(1) That the said parties hereto will, and hereby do associate themselves together as partners, under the firm name and style of the MAUI AGRICULTURAL COMPANY, hereinafter referred to and called the "COMPANY"; the partnership so

formed to be and constitute a company for the promotion and doing of the following acts, business and purposes, viz.:

To purchase and acquire in fee or for a term of years, lands, water rights and privileges in the Territory of Hawaii, for plantation and incidental purposes, and to hire, lease and sell the same.

To engage in agricultural and mercantile pursuits in the Territory of Hawaii, and to do all things necessary or convenient in connection therewith, including the cultivation of sugar cane, and the purchase and sale thereof, and other agricultural products.

To manufacture and sell sugar, and to purchase and construct, maintain and operate mills, sugar works and all machinery and appliances, which may be used for said purpose, and to do all business incidental thereto, or which may be conducted in connection therewith.

To acquire, construct, maintain and operate pumping plants, irrigation works, including artesian wells, pipe lines, ditches, flumes, dams, and reservoirs, and to do all other things incidental to or proper in the business of acquiring water for its own use and the supplying of water to others for hire, for irrigation and other purposes.

To buy and sell all goods, wares and merchandise.

To acquire, construct, maintain and operate railways for moving its crops and supplies, and for other purposes incidental to the plantation business.

To acquire, hold, sell and deal in such personal property, and such rights, easements, privileges and

franchises as may be usefully held or dealt in in connection with its business.

To purchase, hire and operate vessels and steamships if necessary or convenient in carrying on its business.

To transact all business and to do all things which may be lawfully done in connection with the purposes aforesaid, or any of them.

TERM OF PARTNERSHIP.

The term of the existence of the said copartnership hereby formed, shall be forty-five (45) years, beginning with the 1st day of January, A. D. 1904, unless sooner terminated by the mutual consent of the parties hereto.

DIVISION OF CAPITAL STOCK.

The capital stock of the said Company shall be divided into thirty-five (35) equal shares or interests, of which twelve (12) shall belong to the said Haiku, eighteen (18) to the said Paia, and one (1) each to the said Kalialinui, Pulehu, Kula, Makawao, and Kailua.

BORROWING POWER.

The said Company may borrow money for the purposes of its business, in such amounts as it may from time to time require, and as security for the repayment thereof may execute and deliver a mortgage or mortgages on its property;

And it may, at its option, issue bonds with or without interest coupons attached, secured by trust deed or deeds, conveying the property of said Company, or any part thereof, as security for the repayment of the moneys borrowed as aforesaid.

KALIALINUI CONTRIBUTION TO CAPITAL.

The said Kalialinui shall contribute as its share toward the capital stock of the said Company, the use during the term of said partnership of all of its lands situate on the said Island of Maui, containing one thousand (1,000) acres of land, more or less, and also all of its water rights, and being the same land and water rights granted and conveyed to it, the said Kalialinui Plantation Company, Limited, by the Kihei Plantation Company, Limited, by deed dated August 31, 1904, and recorded in the Registry of Deeds in Honolulu, Territory of Hawaii, in Book 270, on page 24, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage.

PULEHU CONTRIBUTION TO CAPITAL.

The said Pulehu shall contribute as its share toward the capital stock of the said Company the use during the term of said partnership of all of its lands situate on the said Island of Maui, containing one thousand (1,000) acres of land, more or less, and also all of its water rights, and being the same land and water rights granted and conveyed to it, the said Pulehu Plantation Company, Limited, by the Kihei Plantation Company, Limited, by deed dated August 31, 1904, and recorded in the Registry of Deeds in Honolulu, Territory of Hawaii, in Book 264, on page 488, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage.

KULA CONTRIBUTION TO CAPITAL.

The said Kula shall contribute as its share toward the capital stock of the said Company, the use during the term of said partnership of all of its lands situate on the said Island of Maui, containing one thousand (1,000) acres of land, more or less, and also all of its water rights, and being the same land and water rights granted and conveyed to it, the said Kula Plantation Company, Limited, by the Kihei Plantation Company, Limited, by deed dated August 31, 1904, and recorded in the Registry of Deeds in Honolulu, Territory of Hawaii, in Book 264, on page 485, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage.

MAKAWAO CONTRIBUTION TO CAPITAL.

The said Makawao shall contribute as its share toward the capital stock of the said Company the use during the term of said partnership of all of its lands situate on the said Island of Maui, containing one thousand (1,000) acres of land, more or less, and also all of its water rights, and being the same land and water rights granted and conveyed to it, the said Makawao Plantation Company, Limited, by the Kihei Plantation Company, Limited, by deed dated August 31, 1904, and recorded in Book 270, on page 28, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage.

KAILUA CONTRIBUTION TO CAPITAL.

The said Kailua shall contribute as its share toward the capital stock of the said Company the use during the term of said partnership of all of its lands situate on the said Island of Maui, containing one thousand (1,000) acres of land, more or less, and also all of its water rights, and being the same land and water rights granted and conveyed to it, the said Kailua Plantation Company, Limited, by the Kihei Plantation Company, Limited, by deed dated August 31, 1904, and recorded in Book 270, on page 33, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage.

HAIKU CONTRIBUTION TO CAPITAL.

The said Haiku shall contribute as its share toward the capital stock of the said Company the use during the term of said partnership of all of its property, real, personal and mixed, including all water and water rights, and all and every interest or interests in water or water rights, both legal and equitable, situate on the Island of Maui, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage, subject to the following reservations, viz.:

RESERVATIONS BY HAIKU.

Sugar.—All of the sugar heretofore manufactured by the said Haiku and now unsold.

Crop of 1902-3.—All of the yet unharvested cane of the crop of 1902-3, now growing on its said lands.

Water.—All water necessary to irrigate, mature, harvest and manufacture the said crop of 1902-3.

Use of Mills, Etc.—The free use of all its mills, pumps, machinery, tools, railroads, carts, harnesses, animals, and other appurtenances or appliances, incidental to or necessary or proper for the purpose of cultivating, irrigating, maturing, harvesting and manufacturing said reserved crop of sugar cane into sugar and molasses.

Money and Credits.—All money now in the hands of the said Haiku, all credits due to it, and all credits which may hereafter become due to it, by or through the manufacture or sale of said crop of sugar of 1902-3.

PAIA CONTRIBUTION TO CAPITAL.

The said Paia shall contribute as its share toward the capital stock of the said Company the use during the term of said partnership of all of its property, real, personal and mixed, including all water and water rights, and all and every interest or interests in water or water rights, both legal and equitable, situate on the Island of Maui, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage; subject to the following reservations, viz.:

RESERVATIONS BY PAIA.

Sugar.—All of the sugar heretofore manufactured by the said Paia and now unsold.

Crop of 1902-3.—All of the yet unharvested cane of the crop of 1902-3, now growing on its said lands.

Water.—All water necessary to irrigate, mature,

harvest and manufacture the said crop of 1902-3.

Use of Mills, Etc.—The free use of all its mills, pumps, machinery, tools, railroads, carts, harnesses, animals, and other appurtenances and appliances, incidental to, necessary or proper for the purpose of cultivating, irrigating, maturing, harvesting and manufacturing said reserved crop of sugar cane into sugar and molasses.

Money and Credits.—All money now in the hands of the said Paia, all credits due to it, and all credits which may hereafter become due to it, by or through the manufacture or sale of said crop of sugar of 1902-3.

OWNERSHIP OF LANDS.

The ownership of all of the lands and interests in land, water and interests in water, the use of which is hereby agreed to be furnished by the respective parties hereto for the use of the Company, shall remain absolutely in the present owners thereof, subject only to the use thereof by the Company for the said term of forty-five (45) years upon the terms and conditions herein set forth.

ADVANCE BY HAIKU.

The said Haiku shall, immediately upon the execution of this partnership agreement, or from time to time thereafter as funds may be required by the Company, advance and furnish to the said Company for the use of the same, the sum of three hundred thousand dollars (\$300,000.00) which, it is proposed, shall be obtained by borrowing the same, repayment thereof to be secured by coupon bonds payable in not more than twenty (20) years nor less than seven

(7) years, the interest payable thereon not to exceed the rate of six per cent (6%) per annum, payable semi-annually, the payment of said bonds to be secured by a trust mortgage upon all of the property of the said Haiku.

ADVANCE BY PAIA.

The said Paia shall, immediately upon the execution of this partnership agreement, or from time to time thereafter as funds may be required by the Company, advance and furnish to the said Company, for the use of the same, the sum of four hundred and fifty thousand dollars (\$450,000.00) which, it is proposed shall be obtained by borrowing the same, repayment thereof to be secured by coupon bonds, payable in not more than twenty (20) years nor less than seven (7) years, the interest payable thereon not to exceed the rate of six per cent (6%) per annum, payable semi-annually, the payment of the same to be secured by a trust mortgage upon all the property of the said Paia.

PARTNERSHIP ASSUMPTION OF DEBTS AND LIABILITIES.

The Company shall be liable for and hereby assumes the payment of the following debts and obligations, viz.:

(a) *Haiku Bonded Debt.* The said sum of three hundred thousand dollars (\$300,000.00) agreed to be advanced by said Haiku, or so much thereof as may be actually so advanced, and the interest thereon, and all costs, charges and expenses of every kind and nature incidental thereto or arising out of the making of said loan and the discharge and payment thereof;

(b) *Paia Bonded Debt.* The said sum of four hundred and fifty thousand dollars (\$450,000.00) agreed to be advanced by the said Paia, or so much thereof as shall be actually so advanced, and the interest thereon, and all costs, charges and expenses of every kind and nature incidental thereto or arising out of the making of said loan and the discharge and payment thereof;

(c) *Rents.* All rents coming due during the term of said partnership on any leased lands or for any water or water right, or interest in water or water right, the use of which is by this instrument given to the Company, or which may hereafter be acquired by the Company, and on any land the use of which shall hereafter accrue to the Company;

(d) *Taxes.* All taxes which shall be assessed on or after January 1st, 1904, upon any of property of the parties hereto, the use of which is by this instrument given to the Company, or which shall hereafter accrue to the use of the Company; liability for such after acquired property to date from the time when the same accrues to the use of the Company.

(e) *Crop Expenses.* All expenditures made and obligations incurred, if any, by either of the parties hereto, whether prior to the execution hereof or subsequent thereto, upon or toward the crop or crops to be hereafter harvested for or on account of the Company; or otherwise, in connection with the development of the Company;

A full statement of such expenditures and obligations shall be made up as of January 1, 1904, and

agreed upon between the parties hereto and when so made up and agreed upon shall be and constitute an account stated between the parties hereto as to the subject matter thereof. The several amounts found due to the several parties hereto in said accounts stated shall be credited on the books of the partnership to the several parties respectively entitled thereto, and shall be paid from time to time by the partnership at the times and in the amounts requested by the parties entitled thereto.

(f) *Koolau Water Development.* All expenditures for leases, rents, surveys, and engineering, reports, measurements of water and other expenses incurred in connection with the investigation, developing and securing of the Koolau water, so-called, which is to be brought to the lands of the parties hereto, whether such expenditures have already been made or may hereafter be incurred.

EXPENSES TO BE PAID BEFORE DIVIDENDS.

All of the current expenses and regular fixed charges of the Company shall be first paid by the Company before any profits thereof shall be divided among the parties hereto.

MANAGEMENT OF THE COMPANY.

The business of the Company shall be managed and controlled by a Board of Managers of six (6) persons, two (2) of whom shall be appointed annually by said Haiku Sugar Company, three (3) by said Paia Plantation Company, and one (1) by said parties of the Third, Fourth, Fifth, Sixth, and Seventh parts, jointly, who shall respectively serve until their respective successors are appointed.

The said Board of Managers shall annually appoint from among their number a President, Vice-President, Secretary and Treasurer, who shall respectively perform the duties usually appurtenant to such offices in a business of the character of that to be conducted by the partnership.

SECURITY FOR ADVANCES.

All expenditures for the development, installation and conduct of the business of the Company shall be made with and from the property and moneys herein provided for, and from the proceeds of the sales of the products and property of the Company, or from moneys borrowed by the Company, or from other receipts by the Company, but if any one or more of the parties hereto shall advance or furnish any further property or moneys for the use of the Company, in addition to that herein provided for, then and in any such case and cases the value of the property so furnished or the amount of the money so advanced shall be and constitute a debt due by the Company to the partner so furnishing or advancing such property or moneys, which debt, with the interest thereon, shall constitute and be a first lien upon all of the property and assets of the Company until the same is paid in full.

DIVISION OF LOSSES.

All losses incurred by the Company, if any, shall be borne by the parties hereto in the proportion of twelve thirty-fifths (12-35) by the said Haiku Sugar Company, eighteen thirty-fifths (18-35) by the said Paia Plantation and one thirty-fifth (1-35) each

by the said Parties of the Third, Fourth, Fifth, Sixth and Seventh Parts.

DIVISION OF PROFITS.

All profits, after payment of operating expenses, fixed charges, and debts of the Company which are due, and the setting aside of such sinking fund for the retirement of said bonded debts, or for such reserve fund as may be determined by the Board of Managers, shall be divided among the parties hereto in the same proportion as last herein enumerated for division of losses.

Said division of profits shall take place annually, or so much oftener as shall be decided by the Board of Managers.

RENEWALS AND EXTENSIONS OF LEASES AND WATER RIGHTS.

If at any time during the term of this agreement any lease or leases of any of the lands, or water or water rights, or agreements concerning water or water rights, the use of which is hereby assured to the Company, shall lapse, expire or otherwise be terminated, the party hereto who is, or the parties hereto who are, the lessee or lessees, under such lease or leases, or beneficiary under such agreement, shall, if so requested by the Company, secure a new lease or leases, or renewal of contract, or an extension of the existing leases or contract if possible to do so upon terms profitable to the partnership, which renewals, extensions, new leases, contracts, and the premises, property or rights thereby demised or otherwise secured, shall be and become subject to the use of the Company in the same manner and to

the same extent as though the same were now in existence and the use thereof by this instrument now conveyed and assigned to the Company; subject, however, to the assumption and payment by the Company of all of the expenses incurred in the securing of such renewals, extensions, new leases or contracts, or any of them, and of all rents, taxes and other expenditures, if any, to which the lessee or contractor under any of said extended or renewed lease or leases, or contract or contracts, shall become subject during the term hereof.

INDIVIDUAL ASSUMPTION OF EXISTING DEBTS.

Each of the parties hereto shall, except as hereinbefore otherwise provided, be solely and individually liable and responsible for its debts and obligations existing at the date hereof, and the Company shall not be liable, either directly or indirectly, for the payment of the same or the interest thereon, or any part thereof.

BOOKS AND ACCOUNTS.

Full, accurate and complete books and accounts of the receipts, expenditures, assets and liabilities of the Company, and records of its transactions shall at all times be kept, which during all business hours shall be open to the inspection and examination of any of the parties hereto or their duly accredited representative or representatives.

DISSOLUTION OF PARTNERSHIP.

Upon the termination of the term of this partnership agreement, or other sooner determination thereof, the debts and obligations of the Company

shall first be paid and settled from and with the funds, property and assets belonging to the Company.

All surplus funds, property and assets of the Company, if any, after the payment and settlement of all debts and liabilities, shall belong in severalty and be divided among the parties hereto, *pro rata* according to their several proportionate ownership in the Company, as hereinabove set forth, viz.:

Twelve thirty-fifths (12-35) to the said Haiku, eighteen thirty-fifths (18-35) to said Paia, and one thirty-fifth (1-35) to each of said Parties of the Third, Fourth, Fifth, Sixth and Seventh Parts.

Provided, however, that each party shall upon any dissolution of this partnership retain and be the sole and individual owner of the respective lands, lease or leases, water right or water rights, or renewals or extensions of lease or leases, water right or water rights, and personal property then in existence, the use of which is by the terms of this agreement respectively given by the parties hereto to the Company only for and during the continuance of this partnership.

IN WITNESS WHEREOF, the said respective parties hereto, by their respective officers thereunto duly authorized, have hereunto respectively caused their respective corporate seals to be hereto attached and their corporate names to be hereto signed, the day and year first above written.

Witness to Signatures: L. A. THURSTON.

HAIKU SUGAR COMPANY,

By H. P. Baldwin, President.

By W. M. Alexander, Treasurer.

PAIA PLANTATION,

By H. P. Baldwin, President.

By W. M. Alexander, Treasurer.

KALIALINUI PLANTATION COMPANY,
LIMITED,

By H. P. Baldwin, President.

By Geo. M. Rolph, Treasurer.

PULEHU PLANTATION COMPANY, LIM-
ITED,

By H. P. Baldwin, President.

By Geo. M. Rolph, Treasurer.

KULA PLANTATION COMPANY, LIM-
ITED,

By H. P. Baldwin, President.

By Geo. M. Rolph, Treasurer.

MAKAWAO PLANTATION COMPANY,
LIMITED,

By H. P. Baldwin, President.

By Geo. M. Rolph, Treasurer.

KAILUA PLANTATION COMPANY, LIM-
ITED,

By H. P. Baldwin, President.

By Geo. M. Rolph, Treasurer.

Exhibit "B."

BY-LAWS

of the

Maui Agricultural Company.

(A Partnership)

ARTICLE I.

PRINCIPAL OFFICE.

The principal office of the Company shall be at such place in Honolulu, Island of Oahu, Territory of Hawaii, as the Board of Managers may from time to time select. Until further notice, such office is declared to be in the Stangenwald Building on Merchant street.

ARTICLE II.

CERTIFICATE OF INTEREST OF THE PARTNERS.

The respective interests of the partners as set forth in the Articles of Partnership shall be evidenced by a certificate in such form and device as the Board of Managers may adopt.

ARTICLE III.

REPRESENTATION.

At all meetings of the Company each partner shall be respectively represented by its Board of Directors; and the said partners, and each of them, shall be entitled to no other or further representation at such meetings than through its Board of Directors.

ARTICLE IV.

BOARD OF MANAGERS.

The members of the partnership shall each year

elect or appoint, in accordance with their respective By-Laws, managers to represent the partners in accordance with their respective interests, as set forth in the Articles of Partnership, as follows:

Haiku Sugar Company shall elect or appoint two managers; Paia Plantation shall elect or appoint three managers; and one manager shall be jointly elected or appointed by the remaining members of said partnership, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited.

Said managers shall serve for one year and until their successors are appointed or elected.

Each manager shall be entitled to one vote at all meetings of the Board of Managers.

ARTICLE V.

OFFICERS.

The members of the partnership shall likewise elect or appoint an Auditor who need not be a member of the Board of Managers. Such Auditor shall serve for one year and until his successor is appointed or elected.

The Board of Managers shall elect from their own members a President, and Vice-President, Secretary and Treasurer. ~~They shall also appoint an Auditor, who need not be a member of the Board of Managers.~~ A majority of the votes of the managers elects.

Amended
Feb.-14-1916.

Elections shall be by ballot, provided that when there are no opposing nominations the Secretary

may be directed to cast the ballot for the members present or represented.

ARTICLE VI.

QUORUM.

A majority of the partners, both in number and interest, shall constitute a quorum; and the By-Laws of the respective partners shall determine whether or not such partner is properly represented by its Board of Directors; that is to say: whether or not there is present at meetings of the Company a sufficient number of Directors of each partner respectively to properly represent such partner.

A majority of the Board of Managers shall constitute a quorum at meetings of the Board, but no business shall be valid unless it shall receive a concurring vote of a majority of all managers.

A minority may adjourn over from time to time and take measures to procure the attendance of a quorum.

ARTICLE VII.

VACANCIES.

1. The office of manager shall be vacated:

- (a) If he becomes bankrupt or insolvent;
- (b) If he be declared a lunatic or of unsound mind;
- (c) If he fails to attend to the Company's business for three months without the consent of the Board of Managers;

(d) By resignation or death.

2. Any vacancy which may occur in the Board of Managers shall be filled by appointment for the remainder of the term by the Board of Directors of

the partner which such manager represents.

3. In case of the absence from the Island of Oahu of any member of the Board of Managers, the Board of Directors of the partner which such manager represents shall in writing appoint some qualified person to perform the duties of such manager, and the person so appointed shall have, during such absence, all the powers and be subject to all the obligations of such absentee.

ARTICLE VIII.

MEETINGS AND NOTICES.

1. The annual meeting of the Company shall be held each year at the office of the Company in Honolulu within the month of February. Special meetings shall be called upon the request of the President or Vice-President, any one of the partners, or any one of the Board of Managers.

2. Notice of all meetings of the Company shall specify the place, day and hour of the meeting, and whether annual or special.

3. Written notice of all meetings of the Company shall be served upon each Director of each of the respective partners by delivering the same to him personally or leaving the same at his regular place of business in Honolulu. It shall be the duty of the Secretary of the respective partners to inform the Secretary of the Company of the names and places of business of the Directors of each of the respective partners, and to advise the Secretary of the Company of any changes in the Directorate of such partner. The non-receipt of notice as in this paragraph provided shall not invalidate the proceedings

of any Company meetings if a quorum be present.

4. Written notice of all meetings of the Board of Managers shall be served upon each Manager by delivering the same to him personally or leaving the same at his regular place of business in Honolulu. The non-receipt of such notice shall not invalidate the proceedings of any Managers' meeting if a quorum is present.

ARTICLE IX.

POWERS AND DUTIES OF MANAGERS.

The Board of Managers shall have power:

1. To call meetings of the Company whenever they shall deem necessary, giving the notice prescribed in these By-Laws, and they shall call a meeting at any time upon the written request of any partner or manager.

2. To make rules and regulations not inconsistent with the laws of the Territory of Hawaii, or with these By-Laws, for the guidance of the officers and management of the affairs of the Company.

3. To incur such indebtedness as they may deem necessary and to authorize the execution of the Company's notes for such indebtedness, provided that the issuing of bonds and execution of trust deeds or mortgages shall require the prior authorization or subsequent ratification of the Company.

4. To exercise full control and management of the business and affairs of the Company, and to exercise all the powers and perform all the acts which the Company can legally exercise and perform under its Articles of Partnership.

5. To fix the salary of the General Manager of

the Company, and they may at their discretion allow reasonable compensation to the managers for their services.

6. It shall be the duty of the Board of Managers to cause a complete record of all meetings of the Company and of the Managers and of all acts of the Company to be kept and preserved; to supervise all the acts of officers and employees, and require that full and accurate books of account shall be kept of the receipts and disbursements of the Company.

7. It shall be the duty of the Board of Managers to annually (or oftener as they may decide) divide the profits of said Company in the proportion as set forth in the Articles of Partnership; and the Board of Managers shall apportion the losses, if any, in the same manner. Provided, however, that the Board of Managers may set apart a reserve fund as hereinafter provided.

8. To appoint agents to act for the Company, either on the mainland of the United States, Territory of Hawaii, or in any foreign country; and confer upon them such powers and authority as may to the Board seem best; and to fix the compensation of such agents, either by salary or otherwise, in their discretion, but they shall always retain the right to suspend or remove such agents and annul any power or authority which may have been granted to them.

9. The Board of Managers shall at least once in each year make a full and detailed statement of the condition of the partnership, showing the work done for the previous period, the work in contemplation for the next ensuing period, with full explanations,

so that each corporation forming the partnership may obtain therefrom full information with reference to all partnership business and transactions. Said statement shall summarize the different items of receipts and expenditures, with sufficient detail to thoroughly inform the corporations of the business affairs of the Company, and shall contain a trial balance sheet showing the net gains or losses of the business for the preceding period. This statement shall be printed in pamphlet form, and one copy shall be sent by the Company to each stockholder in each of the corporations.

ARTICLE X.

PRESIDENT AND VICE-PRESIDENT.

1. The President shall preside at all meetings of the Company and managers; shall sign all notes, contracts and instruments in writing which have been first authorized and approved by the Board of Managers.

2. He shall call meetings of the Company and of the Board of Managers, whenever in his opinion the interests of the Company require it, and shall have, subject to the advice and control of the managers, the general management, superintendence and supervision of the Company's business and property.

3. In the absence or disability of the President, the Vice-President shall perform his duties.

ARTICLE XI.

SECRETARY.

1. It shall be the duty of the Secretary to keep minutes of the proceedings of all meetings of the

Company and of the Board of Managers and to enter the same in a book of records, certified by his signature. He shall call a meeting of the Company, when requested so to do by the President, or, in his absence, the Vice-President, or any member of the Board of Managers or any partner; shall call meetings of the Board of Managers when requested so to do by any member thereof, and shall give notice of annual meetings and of special meetings.

2. He shall perform such other duties as properly pertain to the office, or such as the Managers shall prescribe.

ARTICLE XII.

TREASURER.

It shall be the duty of the Treasurer to take charge of all moneys paid to the Company, to give receipts therefor, and to keep safely all moneys, notes, bonds, deeds and all other evidences of property. He shall, together with the President, or in his absence, the Vice-President, sign all bonds, mortgages, deeds, leases, notes, or other instruments binding the Company. He shall keep account in a correct and accurate manner of all financial transactions, and make yearly statements thereof and present the same to the Company. He shall receive and deposit moneys and make payments and remittances under instructions of the Board of Managers. He shall exhibit his books, vouchers, and evidences of property when requested to do so by any one of the Managers or any person entitled to inspect the same. He shall perform all other acts necessary to the faithful discharge of his duties.

ARTICLE XIII.

AUDITOR.

It shall be the duty of the Auditor, after the end of each quarter, and whenever directed by the Board of Managers, to examine all of the books, accounts, vouchers, balances and evidences of property of the Company, and report thereon to the Board of Managers.

ARTICLE XIV.

ABSENCE OF OFFICERS.

In case of the absence or disability of the Secretary, his duties shall be performed by the Treasurer, and in the absence or disability of the Treasurer, his duties shall be performed by the Secretary. In case of the absence or disability of both these officers, their duties shall be performed by the President or Vice-President.

ARTICLE XV.

POWERS TO ENDORSE, ETC.

The President or Vice-President and the Treasurer or Secretary shall have the power and authority, on behalf of the Company, to make, execute and deliver all receipts, acquittances, releases or other instruments on behalf of the Company, and endorse checks, drafts and other papers drawn on or payable to the Company.

ARTICLE XVI.

RIGHT OF INSPECTION.

The stockholders in the several corporations partners shall have the same rights of inspection and examination of the books and records of the Com-

pany, and the same rights of investigation into the partnership affairs that they now have in the several corporations in which they hold stock.

ARTICLE XVII.

LIABILITY OF MANAGERS.

No manager or other officer of the Company shall be liable for the defaults or neglects of any other manager or officer, nor for any acts of the Company or of the Board of Managers, nor for any loss sustained by the Company, unless the same has resulted through his own negligent wilful act.

ARTICLE XVIII.

RESERVE FUND.

The Managers may, with the consent of any meeting of the Company, set aside out of the profits of the Company, such sum or sums as they shall deem proper as a reserve fund, from the principal and interest of which to meet contingencies or for equalizing dividends, extending or maintaining the works, business or property of the Company, or any part thereof, or for meeting any bonded indebtedness or other debt of the Company.

The Managers may invest the sum or sums so set apart as a reserve fund in such securities as they may deem proper, including outstanding bonds of the Company, and may change such investment at their discretion.

ARTICLE XIX.

BONDS.

At the request of the Board of Managers, any officer and employee of the corporation, except the

President and Vice-President, shall execute a bond to the corporation with good and sufficient surety or sureties, conditioned upon the faithful performance and observance by the officer or employee giving such bond, of his duties as such officer or employee, and indemnifying the corporation against all loss by reason of or arising out of any failure to so observe and perform such duties.

Such bonds may, in the discretion of the Managers, contain any other conditions or requirements.

The amount of each such bond shall be a substantial one, and shall be fixed by the Managers. The surety or sureties on said bonds shall be subject to approval by the Managers. The premiums on said bonds shall be paid by the corporation.

ARTICLE XX.

AMENDMENTS.

These By-Laws may be altered, amended or repealed by a majority of all the votes of the Company at any annual meeting or at any meeting of the Company called for such purpose. Provided, however, that Paragraph 9 of Article IX, in regard to annual statements, and Article XVI, in regard to right of inspection, may only be altered, amended or repealed by a nine-tenths vote of all of the stockholders of each and every partner corporation.

[Endorsed]: No. —. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation

Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, Plaintiffs, vs. John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, Defendant. Demurrer. Filed July 6, 1917 at 3 o'clock and 45 minutes P. M. (Sgd.) A. E. Harris, Clerk. S. C. Huber, United States Attorney. James J. Banks, Assistant U. S. Attorney. [27]

In the United States District Court for the Territory of Hawaii.

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,
Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii,
Defendant,

Demurrer.

Comes now the defendant, John F. Haley, Collector of Internal Revenue of the United States for the District of Hawaii, and demurs to the complaint filed herein, and for grounds thereof, states:

I.

That the said complaint does not set forth facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint shows on the face thereof that plaintiff, Maui Agricultural Company, is a joint stock company or association.

(Signed) S. C. HUBER,
U. S. Atty., Atty for Def. [28]

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law and that the same is not filed for the purpose of delay.

(Signed) S. C. HUBER,
United States Attorney.

Due and legal service of the foregoing demurrer is hereby accepted and the receipt of a true copy thereof acknowledged.

Dated this 6th day of July, A. D. 1917.

(Signed) FREAR, PROSSER, ANDER-
SON & MARX,

Attorneys for Plaintiffs. [29]

[Endorsed]: No. ——. In the District Court of the United States, for the Territory of Hawaii. The

United States of America, vs. Haiku Sugar Company. Joinder in Demurrer. I hereby acknowledge service of the Within Joinder in Demurrer, and Receipt of a Copy Thereof, this 15th day of June, 1917. (Signed) S. C. Huber, Attorney for Plaintiff. Filed July 10th, 1917, at 3 o'clock and 45 minutes P. M. (Sgd.) A. E. Harris, Clerk. Frear, Prosser, Anderson & Marx, Smith, Warren & Whitney, Attorneys for Defendant. [30]

*In the United States District Court for the Territory
of Hawaii.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAIKU SUGAR COMPANY,
Defendant,

Joinder in Demurrer.

The defendant in the above-entitled action having heretofore filed its answer to the plaintiff's complaint herein, and the plaintiff having on the 13th day of June, 1917, filed its demurrer to said answer, the defendant now files this its joinder in said demurrer and alleges that the matters contained in said answer constitute a sufficient defense in law to the plaintiff's action herein, and that the defendant is ready to verify and prove the same as the Court shall direct.

Dated Honolulu, T. H., June 15th, 1917.

(S.) FLEAR, PROSSER, ANDERSON &
MARX,

(S.) SMITH, WARREN & WHITNEY,
Attorneys for Defendant. [31]

[Endorsed]: No. ——. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, Plaintiffs, vs. John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, Defendant. Suggestion of Death and Motion of Substitution. Filed Sep. 28, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, 205 Bank of Hawaii Bldg., Honolulu, T. H. Flear, Prosser, Anderson & Marx, 303 Stangenwald Bldg., Honolulu, T. H., Attorneys for Plaintiffs. [32]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION,
KALIALINUI PLANTATION COMPANY, LIMITED,
PULEHU PLANTATION COMPANY, LIMITED,
KULA PLANTATION COMPANY, LIMITED,
MAKAWAO PLANTATION COMPANY, LIMITED,
and KAILUA PLANTATION COMPANY, LIMITED,
Copartners Doing Business Under the Firm Name of MAUI
AGRICULTURAL COMPANY,
Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of
the United States for the District of the Territory
of Hawaii,
Defendant.

Suggestion of Death and Motion of Substitution.

Come now the plaintiffs in the above-entitled action by Frear, Prosser, Anderson & Marx, and Smith, Warren & Whitney, their attorneys, and suggest to this Honorable Court that John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, is now deceased and that in the Circuit Court of the First Circuit on the 25th day of September, 1917, Ralph S. Johnstone was duly appointed by the Judge of said Court, the executor under the will and of the estate of the said John F. Haley.

WHEREFORE the plaintiffs herein do move this Honorable Court that the name of said Ralph S. Johnstone, executor under the will and of the estate of John F. Haley, be substituted in the above-entitled [33] action for the name of the said John F. Haley.

Dated, September 27th, 1917.

FREAR, PROSSER, ANDERSON & MARX,
By (S.) ROBBINS B. ANDERSON, SMITH,
WARREN & WHITNEY,
By (S.) WM. L. WHITNEY.

City and County of Honolulu,
Territory of Hawaii,—ss.

William L. Whitney, being first duly sworn, deposes and says: That he is one of the counsel in the above-entitled cause; that he has read the foregoing petition by him signed for and on behalf of Smith, Warren & Whitney, of counsel for the plaintiffs herein; that he knows the contents thereof and that the same is true.

(Signed.) WM. L. WHITNEY.

Subscribed and sworn to before me this 27th day of September, 1917.

[Seal] (S.) A. K. AONA,
Notary Public First Judicial Circuit, Territory of
Hawaii.

I hereby consent to the granting of the foregoing motion.

(Sgd.) S. C. HUBER,
United States District Attorney for the District of
Hawaii. [34]

[Endorsed]: No. ——. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, Plaintiffs, vs. John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, Defendant. Order. Filed Sep. 28, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, 205 Bank of Hawaii Bldg., Honolulu, T. H., Frear, Prosser, Anderson & Marx, 303 Stangenwald Bldg., Honolulu, T. H., Attorneys for Plaintiffs. [35]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION,
KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,
Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii,
Defendant.

Order of Substitution.

On motion of the plaintiffs herein by Frear, Prosser, Anderson & Marx, and by Smith, Warren & Whitney, their attorneys, and good cause appearing therefor,

IT IS HEREBY ORDERED that the name of Ralph S. Johnstone, executor under the will and of the estate of John F. Haley, be substituted as the defendant herein for and in the stead of John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii.

Dated September 28, 1917.

(S.) HORACE W. VAUGHAN,
Judge of the District Court for the District of
Hawaii. [36]

[Endorsed]: No. 109. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al., vs. John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii. Ralph S. Johnstone, Executor. Opinion of the Court. October 6, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy, [37]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii,

Defendant.

Opinion.

SMITH, WARREN & WHITNEY, and FREAR,
PROSSER, ANDERSON and MARX, Attor-
neys for Plaintiffs.

S. C. HUBER, United States Attorney, and J. J.
BANKS, Assistant United States Attorney, for
Defendant.

HORACE W. VAUGHAN, Judge.

SYLLABI.

Statutes construed: Paragraph "C" of section II of
Act of October 3, 1913, levying tax on incomes
of corporations, joint stock companies or asso-
ciations, and insurance companies, not including
partnerships, construed to include within
meaning of joint stock companies or associa-
tions those organized under the common law,
though considered in law partnerships, and to
include within the meaning of partnerships or-
dinary partnerships only and not joint stock
companies or associations.

Joint stock companies—Defined: Agreement be-
tween parties examined, and the "partnership"
organized held to be a joint stock company.
[38]

OPINION.

This action was brought to recover the sum of
Forty Thousand Six Hundred Fifty-two Dollars and
Ninety Cents (\$40,652.90), alleged to have been paid
by the Maui Agricultural Company on September
5th, 1916, to the defendant as Collector of Internal
Revenue of the United States for the District of

Hawaii "involuntarily, under duress and in compliance with and by compulsion of the insistent requests, demands, and threats of said Commissioner of Internal Revenue and the said Collector, and in order to avoid penalties, interest, distraint of its property and other liabilities, hardships and inconveniences, and by necessity of law in order to be entitled to obtain redress and maintain suit to recover same"; the said sum of Forty Thousand Six Hundred Fifty-two Dollars and Ninety Cents (\$40,652.90), paid by said Maui Agricultural Company as aforesaid, being the aggregate amount of income taxes demanded by defendant of said Maui Agricultural Company for the years 1913, 1914 and 1915, together with fifty per cent of the amount of the income tax claimed for each of said years as an additional tax or penalty for the neglect of said Maui Agricultural Company to make lists or returns of its income tax for said years within the times required by law.

The defendant filed a general demurrer to the complaint, in which plaintiffs joined; and the demurrer is now for decision. It is not necessary to quote or state the allegations of the petition or complaint. The question in the case is whether or not paragraph "G" of section II of the Act of October 3, 1913, required the levy and assessment against the Maui Agricultural Company of the tax which said paragraph provides "shall be levied, assessed," etc., against "every corporation, [39] joint stock company or association and every insurance company, organized in the United States, no matter how

created or organized, not including partnerships." And the determination of this question depends upon whether the Maui Agricultural Company is a corporation or a joint stock company or association within the meaning of paragraph "G" of section II of the Act of October 3, 1913, or is a "partnership" within the meaning of the word as used in said paragraph of said Act. If it is neither a corporation nor a joint stock company or association, the paragraph imposes no tax upon it; if it is a "partnership" within the meaning of the word as used in the paragraph it is not subject to the tax. It becomes necessary, therefore, to ascertain the meaning of the paragraph as affecting the question involved, and also to determine what kind of creature the Maui Agricultural Company is.

Let us first ascertain the meaning of the paragraph. It is quite lengthy and contains many subdivisions and provisos; but as far as applicable to this case it reads as follows:

"That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted

and capital invested within the United States during such year."

The normal tax hereinbefore imposed upon individuals is so imposed in subdivision 1 of paragraph "A" of the section. The paragraphs of the section preceding paragraph "G" relate to and regulate the collection of income taxes from natural persons. In subdivision 2 of paragraph "A" is levied on individuals an "additional tax of 1 per centum per annum upon the amount by which the total net income exceeds \$20,000 and [40] does not exceed \$50,000, and 2 per centum per annum upon the amount by which the total net income exceeds \$50,000 and does not exceed \$75,000," etc.

It should be noted that subdivision 2 of paragraph "A" expressly provides that, "For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits,—of all corporations, joint stock companies, or associations," etc. In paragraph "D" it is expressly provided "that persons liable for the normal tax only, on their own account or on behalf of another, shall not be required to make return of the income derived from dividends on the capital stock or from the net earnings of corporations, joint stock companies or associations, and insurance companies taxable upon their net income as hereinafter provided." In paragraph "D" it is also expressly provided, "That any persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any

taxable partner would be entitled if same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid, under the provisions of this section, and any such firm, when requested by the Commissioner of Internal Revenue, or any District Collector, shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same, if distributed." The section proceeds in paragraph "G" to deal with the subject of taxing the incomes of artificial persons, corporations and *quasi* corporations, and it levies on them the "normal tax," levied on individuals by subdivision 1 of paragraph "A" but not the "additional tax" levied by subdivision 2. It can hardly be doubted that it was intended [41] by this paragraph to tax every corporation doing business in the United States, "no matter how created or organized," and every joint stock company or association doing business in the United States, no matter how it may have been created or organized. The very use of this language shows the intention to tax not only those joint stock companies which are organized under statutes and which are *quasi* corporations, but also those which are organized under the common law and which have sometimes been said to be partnerships; the tax is levied on joint stock companies "no matter how created or organized." There could be no reasonable doubt about the meaning of the language but for the use of the words "not including partnerships." It is contended that these words so limit the meaning of "joint stock companies or associations" that those

joint stock companies or associations which are organized at common law and which have been classed as partnerships, are taken out of the general language taxing joint stock companies. This construction would take out all joint stock companies which are not corporations, for all that are not corporations are partnerships, "no matter how created or organized." Any such construction would make the words "joint stock company or association" and "no matter how created or organized" meaningless.

In *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 455, Mr. Justice Harlan delivering the opinion of the Supreme Court, says a joint stock company is a "mere partnership." If the word "partnerships" in paragraph "G" be construed to include within its meaning such joint stock companies or associations as have been called partnerships through possessing all the characteristics which distinguish joint stock companies from ordinary partnerships, all joint stock companies and [42] associations are taken out of the general language by the word "partnerships"; and the words "joint stock company or association" become meaningless, and the paragraph is guilty of the absurdity of subjecting joint companies and associations to the tax and exempting them from it in the same sentence. Such construction should not be given if it can be avoided. In my opinion the words "not including partnerships" were used because of the use of the words "and every insurance company." An insurance company or any other company may be an ordinary partnership or a joint stock company or asso-

ciation or a corporation; the language "insurance company" is descriptive of the kind of business done and not of the character of the company; and but for the use of the words "not including partnerships," an ordinary partnership between individuals doing business as an insurance company would have been included within the meaning of "every insurance company." In my opinion the word "partnerships" was used as it is ordinarily used and in the same sense in which it is ordinarily used and means what it ordinarily means when so used, ordinary partnerships. This is the construction placed upon the paragraph by the Executive Department, which though not controlling upon the courts is persuasive. See Article 79 and Article 94 and Article 86 of Treasury Regulations.

Let us now consider whether the Maui Agricultural Company is a corporation or a joint stock company or association within the meaning of the paragraph.

A copy of the "Partnership agreement and By-laws of the Maui Agricultural Company" is attached to the complaint, as an exhibit. By the terms of that instrument which calls itself "This indenture of Partnership," the seven parties thereto, [43] the plaintiffs in this action, all being corporations duly incorporated and existing under the laws of the Territory of Hawaii, mutually agreed to enter into partnership for the period and for the purposes and upon the terms and conditions therein set forth. The "objects of the copartnership" are set forth, but

need not be repeated here as they do not affect the question.

Under the heading "Term of Partnership," it is provided as follows: "The term of the existence of said copartnership hereby formed, shall be Forty-five (45) years, beginning with the 1st day of January, A. D. 1904, unless sooner terminated by the mutual consent of the parties hereto."

Under the heading "Division of Capital," it is provided as follows: "The capital stock of said Company shall be divided into Thirty-five (35) equal shares or interests, of which Twelve (12) shall belong to said Haiku, Eighteen (18) to the said Paia, and One (1) each to the said Kalialinui, Pulehu, Kula, Makawao, and Kailua." The agreement then specifies what each party "shall contribute as its share towards the capital stock of said Company, the "contribution to capital" by Kalialinui, Pulehu, Kula, Makawao and Kailua, each being "the use during the term of said partnership of all of its lands situate on the said Island of Maui, and also all of its water rights, to be used and employed in common by and between said partners for the support and management of the said business, to their mutual benefit and advantage," and the contributions of Haiku and Paia each being "the use during the term of said partnership of all of its property, real, personal and mixed, including all water and water rights," etc., subject to certain specified reservations. [44]

The agreement provides that, "The ownership of all of the lands and interests in land, water and interests in water, the use of which is hereby agreed

to be furnished by the respective parties hereto for the use of the company, shall remain absolutely in the present owners thereof, subject only to the use thereof by the Company for the said term of forty-five (45) years upon the terms and conditions herein set forth."

Under the heading "Management of the Company" it is provided as follows:

"The business of the Company shall be managed and controlled by a Board of Managers of six (6) persons, two (2) of whom shall be appointed annually by said Haiku Sugar Company, three (3) by said Paia Plantation Company, and one (1) by said parties of the Third, Fourth, Fifth, Sixth and Seventh parts, jointly, who shall respectively serve until their respective successors are appointed.

The said Board of Managers shall annually appoint from among their number a President, Vice-president, Secretary and Treasurer, who shall respectively perform the duties usually appurtenant to such offices in a business of the character of that to be conducted by the partnership."

It is provided that, "All losses incurred by the Company, if any, shall be borne by the parties hereto in the proportion of twelve thirty-fifths (12-35) by said Haiku Sugar Company, eighteen thirty-fifths (18-35) by said Paia Plantation and one thirty-fifth (1-35) each by the said Parties of the Third, Fourth, Fifth, Sixth and Seventh Parts."

It is provided that, "All profits, after payment of

operating expenses, fixed charges and debts of the Company which are due, and the setting aside of such sinking fund for the retirement of said bonded debts, or for such reserve fund as may be determined by the Board of Managers, shall be divided among the parties hereto in the same proportions as last herein enumerated for division of losses.”

This partnership was entered into by said corporations under the authority of an “Act Concerning Corporations,” [45] enacted by the Legislature of the Territory of Hawaii in 1903, now embodied in the Revised Laws of Hawaii of 1915, as sections 3388-3389, which provided that “Any two or more corporations organized and existing under and in conformity with the laws of the Territory of Hawaii, may enter into partnership with each other.” Whether this act authorizes corporations to form such partnerships as come within the definition of joint stock companies, it will be time enough to inquire when action is brought by authority of the Territory of Hawaii to question the right of corporations to form joint stock companies by virtue of the authority given by said Act. The question in this case is whether the “partnership” formed is in fact a joint stock company or association. What is a joint stock company? The Century Dictionary defines joint stock company as follows:

“An association the property or capital of which is represented by stock issued in shares to the members respectively, the object being that changes in membership shall depend, not as in partnership, upon the consent of all the

members, but upon the transfer of shares, which any member may make without the consent of the others, and also that the death of a member shall not dissolve the association, as in case of a partnership, his right being simply transferred to his executors or administrators. Another object usually if not always involved is the rendering of the power to control separable from the right of ownership, by vesting the management in a committee or officers instead of leaving it, as in the case of a partnership, with each member. In the absence of any statute the liability of a joint-stock company and its members, and its means of enforcing its rights as to third persons, are nevertheless precisely those of partners; all the members must join in suing; all are liable for its debts, and all must be joined when sued; and on a change of membership pending a suit a corresponding change of parties may be required."

The organization which was formed by the plaintiffs in this case has all the characteristics of the joint stock company and none of the ordinary partnership except such as joint stock companies have also. [46]

The property or the capital of the company, which consists of the right to use certain properties belonging to the parties to the agreement "during the term of said partnership," is represented by thirty-five equal shares, twelve of which are owned by one of the parties, eighteen by another and one by each of the five others. Whatever may have been the ob-

ject in making this arrangement, it is the arrangement that was made; the parties have stock or shares in the company in proportion to the value of their contributions to the capital. Could not any of the parties sell its share or shares or interest in the company and transfer the same to the purchaser? I find nothing in the agreement that would forbid. I know of no law that would prohibit. It is urged that the purchaser of the shares or interest of any of the parties would have no right to participate in the management, that by the terms of the agreement the right to appoint managers is in the parties only. I can see no reason why this right would not pass to the purchaser along with the ownership of the shares or interest of the party. But even if it should not, it appears to me that the parties have the right to sell their respective shares or interests, and such a sale would not work a dissolution of the company either if the purchaser would or would not have the right to participate in the management, because the agreement provides that the "partnership" shall continue for forty-five (45) years "unless sooner terminated by mutual consent of the parties hereto"; and therefore it is expressly stipulated that nothing shall work a dissolution except mutual consent; and a sale of its interest by one of the parties would not dissolve the company. This arrangement by which the capital stock is represented by shares or interests [47] and the parties may sell their shares or interests without working a dissolution of the company is one of the characteristic features of the joint stock company.

The arrangement by which the management of the affairs of the company is placed absolutely in the hands of a board of managers and none of the "partners" has anything to do therewith except to appoint managers or participate with others in the appointment of one of the six managers, denies to each of the "partners" agency for the company, which ordinarily every member of every partnership has. This arrangement is another characteristic of the joint stock company.

I conclude, therefore, that the Maui Agricultural Company is a joint stock company or association within the meaning of paragraph "G" of section II of the Act of October 3, 1913, and is not a partnership within the meaning of said paragraph, and that said company was subject to the tax imposed by said paragraph.

There is another view of this case which should not be overlooked. We read in Blackstone, "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of Nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations and bodies politic." Blackstone, Book 1, p. 123.

What kind of a person is the Maui Agricultural Company? Is it a natural person or an artificial person? Certainly no one will contend that it is a natural person. If it is not a natural person, then is it not necessarily an artificial person? Is not this

true whatever else it may be, joint stock company or partnership? [48]

An agreement of several corporations to turn over their several properties to a board of managers selected by them to carry on the business, for carrying on which they were themselves created, in accordance with such agreement, the profits and losses to be shared and borne according to their respective interests, specified in the agreement, for a definite period of years, unless dissolution be made sooner by mutual consent, whenever entered into by such corporations by authority of a law authorizing corporations to form partnerships, creates by authority of law an artificial person possessing such powers only as are conferred upon it by law and answers the definition of a corporation given by the law. Is it not then a corporation in contemplation of the law? It is not necessary that it be created as a corporation to make it one in fact, or be called one or that it be chartered as such or even have a charter. *Liverpool Ins. Co. v. Mass.* 10 Wall. (U. S.) 566. *Oliver v. Liverpool & London L. & F. Ins. Co.* 100 Mass, 531. *Clark & Marshall on Private Corporations*, V. 1, p. 48.

Can two or more corporations by forming a "partnership" or a joint stock company when authorized by law to do so, create such a "partnership" or joint stock company as will be exempt from the operation of laws applicable to corporations? If so they can thus take themselves, or rather can take the conduct of their business out from the operation of any law that may be objectionable to them. It

is not necessary to decide the question, for if the Company formed in this case should not be regarded a corporation in contemplation of law it was nevertheless subject to the tax because it is a joint stock company.

(Sgd.) HORACE W. VAUGHAN,
Judge, U. S. District Court. [49]

[Endorsed]: No. ——. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al. v. Ralph S. Johnstone, Executor. Election of Plaintiffs to Stand on Pleadings. Filed Oct. 12, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [50]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION,
KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Election of Plaintiffs to Stand on Pleadings.

Come now the plaintiffs in the above-entitled action, by Frear, Prosser, Anderson & Marx, and by Smith, Warren & Whitney, their attorneys, and not desiring to amend their complaint in the above-entitled action, stand on the pleadings.

Dated Honolulu, T. H., October 12, 1917.

HAIKU SUGAR COMPANY, et al., Doing
Business as Maui Agricultural Company,
By (Sgd.) FREAR, PROSSER, ANDERSON
& MARX,
By (Sgd.) SMITH, WARREN & WHITNEY,
Their Attorneys. [51]

[Endorsed]: No. —. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al., v. Ralph S. Johnstone, Executor. Judgment. Entered in J. D. Book folio 103. Filed Oct. 12, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [52]

In the United States District Court for the Territory of Hawaii.

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Judgment.

This case having come before the Court to be heard upon a demurrer to the complaint, and the Court

having heard the arguments of counsel and having read their briefs and having filed an opinion in writing in favor of the defendant, and plaintiffs having elected not to amend their complaint, but to stand on the pleadings;

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the demurrer be sustained and that judgment be entered for the defendant and against the plaintiffs, and that the plaintiffs take nothing.

Dated Honolulu, T. H., October 20, 1917.

By the Court,

[Seal]

(Sgd.) WM. L. ROSA,
Deputy Clerk.

Approved:

(Sgd.) S. C. HUBER,
United States Attorney.

To the Clerk:

Let the foregoing judgment be entered.

(Sgd.) HORACE W. VAUGHAN,
Judge. [53]

[Endorsed]: In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al. v. Ralph S. Johnstone, Executor. Petition for Writ of Error and Allowance. Filed Oct. 20, 1917, at 10 o'clock and 30 minutes A. M. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [54]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Petition for Writ of Error and Allowance.

Come now Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, copartners doing business under the firm name of Maui Agricultural Company, plaintiffs in the above-entitled cause, by Frear, Prosser, Anderson & Marx, and by Smith, Warren & Whitney, their attorneys, and feeling themselves aggrieved by the decision and judgment sustaining the demurrer to their complaint and denying their claim, and complaining

that there is manifest error to the damage of the plaintiffs in the same as will more in detail appear from the assignment of errors which is filed with this petition; and pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the correction of the errors so complained of; and that a transcript [55] of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and also that an order be made fixing the amount of security which the petitioners shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your Petitioners will ever pray.

Dated Honolulu, T. H., October 20th, 1917.

(S.) SMITH, WARREN & WHITNEY,

(S.) FREAR, PROSSER, ANDERSON &
MARX,

Attorneys for Plaintiffs.

Allowed and the amount of the bond on said writ of error is hereby fixed at \$500.00.

(S.) HORACE W. VAUGHAN,

Judge of the United States District Court for the
Territory of Hawaii. [56]

[Endorsed]: No. —. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al. v. Ralph S. Johnstone, Executor. Writ of Error. Filed Oct. 20, 1917. At 10 o'clock and 30 minutes A. M. A. E. Harris, Clerk. By. (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [57]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable HORACE W. VAUGHAN and
the Honorable JOSEPH B. POINDEXTER,
Judges of the United States District Court for
the District and Territory of Hawaii, GREET-
ING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
said District Court, before you, in the case of Haiku
Sugar Company, Paia Plantation, Kalialinui Plan-
tation Company, Limited, Pulehu Plantation Com-
pany, Limited, Kula Plantation Company, Limited,
Makawao Plantation Company, Limited, and Kailua
Plantation Company, Limited, copartners doing
business under the firm name of Maui Agricultural
Company, vs. Ralph S. Johnstone, Executor Under
the Will and of the Estate of John F. Haley, late
Collector of Internal Revenue for the District of the
Territory of Hawaii, a manifest error has happened
to the great damage of the said plaintiffs, as is said
and appears by the petition herein; [58]

We, being willing that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then
under your seal, distinctly and openly, you send
the record and proceedings aforesaid, with all things
concerning the same, to the justices of the United
States Circuit Court of Appeals for the Ninth Cir-

cuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 20th day of October, A. D. 1917.

Attest my hand and seal of the United States District Court in and for the District and Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal]

A. E. HARRIS,

Clerk United States District Court in and for the District and Territory of Hawaii.

By (Sgd.) Wm. L. Rosa,
Deputy.

Allowed this 20th day of October, 1917.

(Sgd.) HORACE W. VAUGHAN,

Judge of the District Court of the United States in and for the District and Territory of Hawaii.

[59]

[Endorsed]: In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al., vs. Ralph S. Johnstone, Executor. Assignment of Errors. Filed Oct. 20, 1917. At 10 o'clock and 30 minutes A. M. A. E. Harris, Clerk.

By (Sgd.) Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [60]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Assignment of Errors.

Come now above-named plaintiffs, Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, copartners doing business

under the firm name of Maui Agricultural Company, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

(1) That the Court erred in sustaining the demurrer of the defendant to the complaint of the plaintiffs, and in ordering judgment for the defendant.

(2) That the Court erred in entering judgment for the defendant and against the plaintiffs.

(3) That the Court erred in holding that the plaintiffs herein, doing business under the name of the Maui Agricultural Company, are a joint stock company or association within the meaning of Paragraph "G" of Section II of the Act of October 3, 1913. [61]

(4) That the Court erred in holding that the plaintiffs herein, doing business as the Maui Agricultural Company, are not a copartnership within the meaning of Paragraph "G" of Section II of the Act of October 3, 1913.

(5) That the Court erred in holding that the plaintiffs were subject to the tax imposed by Paragraph "G" of Section II of the Act of October 3, 1913.

(6) That the Court erred in holding that the plaintiffs take nothing by their said action.

Wherefore plaintiffs pray that said judgment be reversed.

Dated at Honolulu, T. H., October 20, 1917.

(S.) SMITH, WARREN & WHITNEY,

(S.) FREAR, PROSSER, ANDERSON &
MARX,

Attorneys for Plaintiffs. [62]

[Endorsed]: No. ——. In the United States District Court for the Territory of Hawaii. Haiku Sugar Company et al. v. Ralph S. Johnstone, Executor. Citation. Filed Oct. 20, 1917. At 10 o'clock and 30 minutes A. M. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy Clerk. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., and Frear, Prosser, Anderson & Marx, Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiffs. [63]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED and KAILUA PLANTATION COMPANY, LIMITED, Copartners, Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

vs.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to
RALPH S. JOHNSTONE, Executor, Under the
Will and of the Estate of John F. Haley, late
Collector of Internal Revenue for the District
of the Territory of Hawaii, and to the Honor-
able S. C. HUBER, United States District At-
torney for the District of the Territory of
Hawaii, His Attorney, GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit, to be held at the city
of San Francisco, in the State of California, within
thirty days from the date of this writ, pursuant to
a writ of error filed in the Clerk's office of the
United States District Court in and for the District
and Territory of Hawaii, wherein Haiku Sugar Com-
pany, Paia Plantation, Kalialinui Plantation Com-
pany, Limited, Pulehu Plantation Company, Lim-
ited, Kula Plantation Company, Limited, Kula Plan-
tation Company, [64] Limited, Makawao Plan-
tation Company, Limited, and Kailua Plantation
Company, Limited, copartners doing business under
the firm name of Maui Agricultural Company, are
plaintiffs, and you are defendant in error, to show
cause, if any there be, why the judgment in said writ
of error mentioned should not be corrected and
speedy justice should not be done to the parties in
that behalf.

WITNESS the Honorable HORACE W. VAUGHAN, Judge of the District Court for the District and Territory of Hawaii, this 20th day of October, 1917, and of the United States the One Hundred and Forty-first.

HORACE W. VAUGHAN,
Judge of the District Court of the United States in
and for the District and Territory of Hawaii.

Service on behalf of the defendant herein is hereby
accepted.

S. C. HUBER,
District Attorney in and for the District and Terri-
tory of Hawaii. [65]

[Endorsed]: No. ——. In the United States Dis-
trict Court for the Territory of Hawaii. Haiku
Sugar Company et al. v. Ralph S. Johnstone, Execu-
tor. Bond on Writ of Error. Filed Oct. 20, 1917,
at 10 o'clock and 30 minutes A. M. A. E. Harris,
Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.
Smith, Warren & Whitney, Bank of Hawaii Build-
ing, Honolulu, T. H., and Frear, Prosser, Anderson
& Marx, Stangenwald Building, Honolulu, T. H.,
Attorneys for Plaintiffs. [66]

*In the United States District Court for the Territory
of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

VS.

RALPH S. JOHNSTONE, Executor Under the Will and of the Estate of JOHN F. HALEY, Late Collector of Internal Revenue for the District of the Territory of Hawaii.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, copartners doing business under the firm name of Maui Agricultural Company, as principals, and Charles R. Hemenway as Surety, are held and firmly bound unto the United States of America in the penal sum of Five Hundred Dollars (\$500), for the payment of which, well and truly to be made to said

United States of America, we bind ourselves and our respective successors, executors, administrators and assigns by these presents.

The condition of the above obligation is such that:

WHEREAS, on the 20th day of October, 1917, the above-bounden principals sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment [67] made and entered in the above-entitled court and cause on the 13th day of October, 1917, by the Honorable Horace W. Vaughan, Judge of said court:

NOW, THEREFORE, if the said principals shall prosecute their said writ of error to effect and answer all damages and costs if they fail to sustain their writ of error, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, copartners doing business under the firm name of Maui Agricultural Company, have hereunto set their hands by W. O. Smith, Second Vice-President of said Maui Agricultural Company, and John Guild, secretary thereof; and the said Charles R. Hemenway has hereunto set his hand this 20th day of October, 1917.

HAIKU SUGAR COMPANY,

PAIA PLANTATION,

KALIALINUI PLANTATION COMPANY,
LIMITED,

PULEHU PLANTATION COMPANY,
LIMITED,
KULA PLANTATION COMPANY, LIM-
ITED,
MAKAWAO PLANTATION COMPANY,
LIMITED, and
KAILUA PLANTATION COMPANY,
LIMITED,

Copartners Doing Business Under the Firm

Name of Maui Agricultural Company,

(Sgd.) CHAS. R. HEMENWAY.

By (Sgd.) W. O. SMITH,

Second Vice-President.

By (Sgd.) JOHN GUILD,

Secretary.

The foregoing bond is approved.

(Sgd.) HORACE W. VAUGHAN,

Judge, United States District Court, Territory of
Hawaii. [68]

Territory of Hawaii,

City and County of Honolulu,—ss.

Chas. R. Hemenway, being duly sworn, deposes and
says: That he is the surety in the foregoing Bond;
that he is the owner of property of the value of more
than One Thousand (\$1,000) Dollars, over and above
his debts and obligations.

(Sgd.) CHAS. R. HEMENWAY.

Subscribed and sworn to before me this 20th day of
October, A. D. 1917.

(Sgd.) DAVID L. OLESON,

Notary Public First Judicial Circuit, Territory of
Hawaii. [69]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

CIVIL No. 109.

HAIKU SUGAR COMPANY et al.,
Plaintiffs,

vs.

RALPH S. JOHNSTONE, Executor,
Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Territory of Hawaii,—ss.

I, A. E. Harris, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 70, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on writ of error and one (1) order extending time to transmit record on appeal.

I further certify that the cost of the foregoing transcript of record is \$17.25, and that the said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 7th day of December, A. D. 1917.

[Seal]

A. E. HARRIS,
Clerk.

By Wm. L. Rosa,
Deputy. [70]

[Endorsed]: No. 3090. United States Circuit Court of Appeals for the Ninth Circuit. Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, Plaintiff in Error, vs. Ralph S. Johnstone, Executor Under the Will and of the Estate of John F. Haley, Late Collector of Internal Revenue for the District of the Territory of Hawaii, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Filed December 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii,

Defendant.

**Stipulation for Substitution of Joinder in Demurrer
Appearing at Page 58 of Printed Transcript of
Record, etc.**

WHEREAS in the transcript of record filed herein on page 58 thereof there appears a certain joinder in demurrer in the case of The United States of America vs. Haiku Sugar Company, which, by error, appears in place of the joinder in demurrer in the above-entitled action,—

IT IS STIPULATED by and between S. C. Huber, United States District Attorney, and J. J. Banks,

Assistant United States District Attorney, attorneys for defendant herein, and Smith, Warren & Whitney and Frear, Prosser, Anderson & Marx, attorneys for plaintiffs herein, that the joinder in demurrer hereto annexed may be considered as in said transcript of record and may be substituted for the said joinder in demurrer appearing on said page 58 of the transcript of record in the above-entitled action.

Dated at Honolulu, T. H., January 21st, 1918.

FREAR, PROSSER, ANDERSON &
MARX,

SMITH, WARREN & WHITNEY,

Attorneys for Plaintiffs.

S. C. HUBER,

JAS. J. BANKS,

Attorneys for Defendant.

Dated: San Francisco, Cal., Jan. 29, 1918.

SO ORDERED:

WM. H. HUNT,

United States Circuit Judge.

*In the United States District Court for the
Territory of Hawaii.*

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED, and KAILUA PLANTATION COMPANY, LIMITED, Copartners Doing Business Under the Firm Name of MAUI AGRICULTURAL COMPANY,

Plaintiffs,

vs.

JOHN F. HALEY, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii,

Defendant.

Joinder in Demurrer.

Come now the plaintiffs herein, Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, by Smith, Warren & Whitney and Frear, Prosser, Anderson & Marx, Their Attorneys, and join in the demurrer of John F. Haley, Collector of Internal Revenue of the United States for the Dis-

trict and Territory of Hawaii, Defendant Herein.

Dated: Honolulu, T. H., July 10, 1917.

(Sgd.) SMITH, WARREN & WHITNEY.

(Sgd.) FREAR, PROSSER, ANDERSON
& MARX,

Attorneys for Plaintiffs.

[Endorsed]: No. 3090. In the United States Circuit Court of Appeals for the Ninth Circuit. Haiku Sugar Company, Paia Plantation, Kalialinui Plantation Company, Limited, Pulehu Plantation Company, Limited, Kula Plantation Company, Limited, Makawao Plantation Company, Limited, and Kailua Plantation Company, Limited, Copartners Doing Business Under the Firm Name of Maui Agricultural Company, Plaintiffs, vs. John F. Haley, Collector of Internal Revenue of the United States for the District of the Territory of Hawaii, Defendant. Stipulation. Filed Jan. 29, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HAIKU SUGAR COMPANY, PAIA
PLANTATION, KALIALINUI
PLANTATION COMPANY, LIM-
ITED, PULEHU PLANTATION
COMPANY, LIMITED, KULA
PLANTATION COMPANY, LIM-
ITED, MAKAWAO PLANTA-
TION COMPANY, LIMITED, and
KAILUA PLANTATION COM-
PANY, LIMITED, co-partners doing
business under the firm name of MAUI
AGRICULTURAL COMPANY,
Plaintiffs in Error,

VS.

RALPH S. JOHNSTONE, Executor
under the Will and of the Estate of
John F. Haley, late Collector of In-
ternal Revenue for the District of the
Territory of Hawaii,
Defendant in Error.

BRIEF FOR PLAINTIFFS.

**Upon Writ of Error to the United States
District Court for the Territory
of Hawaii**

FREAR, PROSSER, ANDERSON & MARX,
303 Stangenwald Building,
Honolulu, T. H.,
and

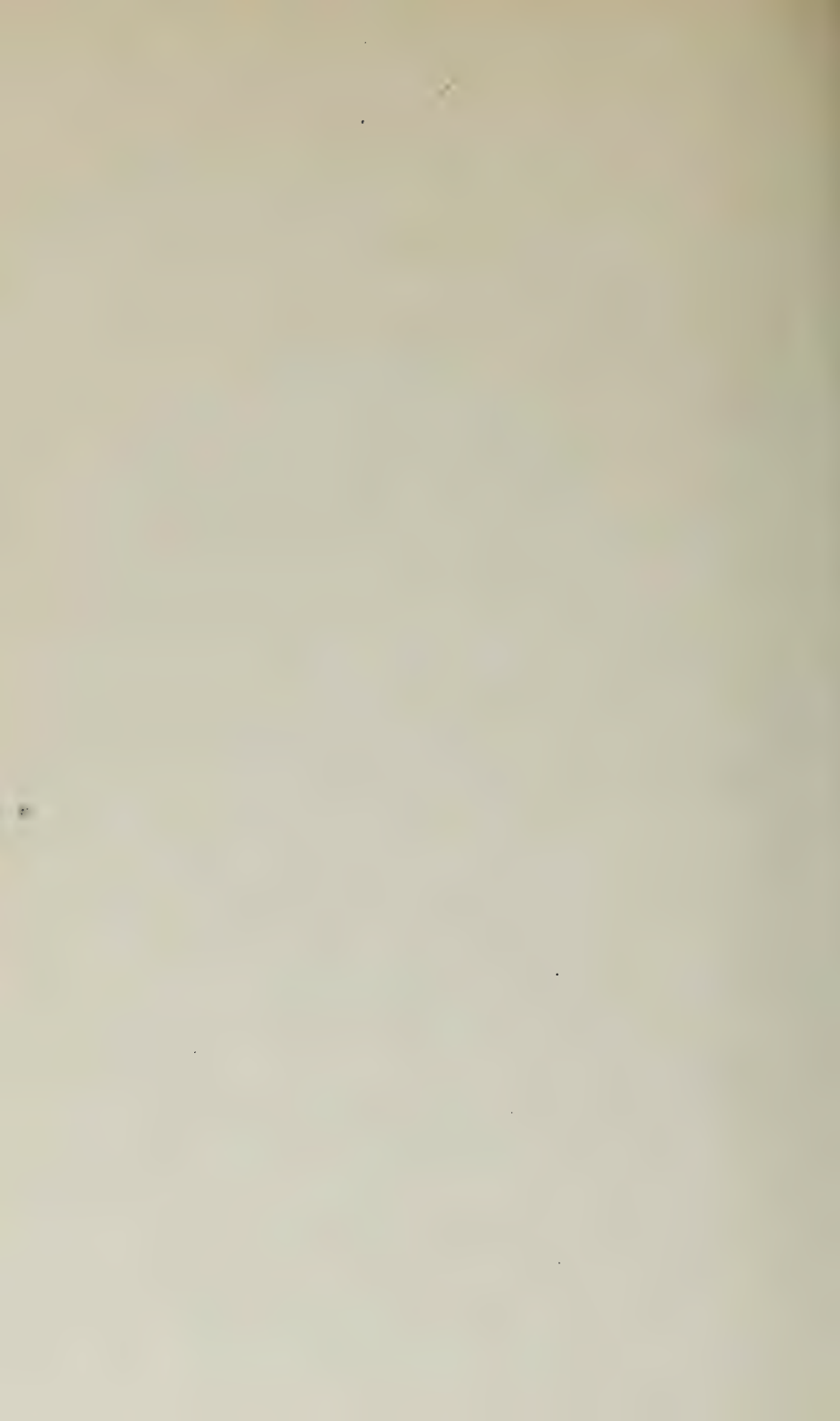
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F. D. MONCKTON,
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United States Circuit Court of Appeals for the Ninth Circuit

HAIKU SUGAR COMPANY, PAIA
PLANTATION, KALIALINUI
PLANTATION COMPANY, LIM-
ITED, PULEHU PLANTATION
COMPANY, LIMITED, KULA
PLANTATION COMPANY, LIM-
ITED, MAKAWAO PLANTA-
TION COMPANY, LIMITED, and
KAILUA PLANTATION COM-
PANY, LIMITED, co-partners doing
business under the firm name of MAUI
AGRICULTURAL COMPANY,
Plaintiffs in Error,

VS.

RALPH S. JOHNSTONE, Executor
under the Will and of the Estate of
John F. Haley, late Collector of In-
ternal Revenue for the District of the
Territory of Hawaii,
Defendant in Error.

On Writ
of Error
to the
District
Court of
Hawaii

BRIEF FOR PLAINTIFFS.

STATEMENT OF THE CASE

This case comes to this court upon writ of error to review a judgment of the United States District Court for the Territory of Hawaii. The plaintiffs in error, all corporations, were the plaintiffs below. The de-

fendant in error was originally John F. Haley, Collector of Internal Revenue for Hawaii, but upon his death, before judgment, the executor of his Will, the present defendant, Ralph S. Johnstone, was substituted in his place.

The facts, being undisputed, were set forth somewhat fully in the complaint (Tr., p. 9), so that the questions of law involved might be raised by demurrer. The defendant demurred. (Tr., p. 57.) The demurrer was sustained. (Tr., p. 65.) The plaintiffs elected to stand on their complaint (Tr., p. 80), and the judgment in question was thereupon entered for the defendant. (Tr., p. 81.)

The action below was brought by the plaintiffs as co-partners doing business under the firm name of the Maui Agricultural Company (Tr., pp. 9-10), for the recovery of the sums of \$2,098.83, \$10,669.56 and \$27,884.51, aggregating \$40,652.90, paid under compulsion and protest on September 8, 1916, as income taxes for the years 1913, 1914 and 1915, respectively, under the Federal income tax law of October 3, 1913, and interest on the said sums from said September 8, 1916. (Tr., p. 25.)

The principal question is whether the Maui Agricultural Company is an organization of such a kind that it is either excepted from or not included under the income tax law of 1913, which, besides applying to persons (Par. A, Sec. II), applies (Par. G, Sec. II), subject to certain enumerated exceptions, to:

“every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships.”

The plaintiffs contend (1) that the Company in question is a partnership and therefore is expressly excluded from the operation of the law; (2) that it is not a corporation, joint-stock company or association, or insurance company, and therefore is not included within the law; and (3) that even if it could be held to belong to the genus "joint-stock company or association," it would nevertheless belong to the species of that genus which is technically held to be a partnership, though not an ordinary partnership, and as such would be excepted from the operation of the law under the general exclusion of partnerships.

Since the case was decided on demurrer, the facts are to be looked for in the complaint (Tr., pp. 9-25), the allegations of which must, of course, for the purposes of the demurrer, be taken as true.

The Company was formed under an "Indenture of Partnership," dated October 30, 1903, to take effect January 1, 1904. By-laws were adopted July 9, 1904, and slightly amended February 14, 1916. Copies of the partnership agreement (Tr., pp. 28-44) and the by-laws (Tr., pp. 45-55) are attached to and made part of the complaint. Corporations were authorized to form partnerships by an Act of the Hawaiian Legislature, which had been passed shortly before, namely, on April 28, 1903 (Tr., pp. 11-12). The partnership in question was registered as a general partnership under an Act of the Hawaiian Legislature of August 9, 1880, which provided for the registration of general partnerships. (Tr., p. 12.) These Acts will be referred to more fully below. The members of the Company in fact intended to form an ordinary general partnership, with

each member a general partner, and the liability of all the members is unlimited. (Tr., p. 11.)

The Company was formed in view and by reason of natural and special relations of the respective particular properties, chiefly lands and water rights, owned by the several members, and in view and by reason of the identity, in large part, of the shareholders of the several corporate members and close and special relations among them, and for the purpose of reducing in their mutual interests the cost of operation by co-operative management and the common use of these properties. These properties were not conveyed to the Company. The ownership of the property of each member is retained by it throughout the term of the partnership. Only its use is contributed to the partnership for the term of the partnership and that reverts to the owners upon the termination of the partnership. No other property was conveyed or money paid or subscribed for anything in the nature of stock or unit shares or otherwise. There was merely a contribution or combining of the use of their particular properties by the respective members for a specified period subject to earlier termination by the mutual consent of these particular members. The Company, indeed, has no capital stock as distinguished from its actual capital or capital assets, and the capital consists mainly of the mere use of these properties. True, it is provided in the by-laws, which, however, were not adopted until more than eight months after the execution of the partnership agreement, that the share or interest, that is, the whole interest (not unit shares), of each partner in the capital or capital assets should be evidenced by a certificate, which provision, however, has never been car-

ried out, but no stock or shares of stock or certificates of stock or certificates of shares of stock have ever been issued, or (except as to certificates of the proportionate interests of the several partners) been intended to be issued; nor has the share or interest of any member ever had any par or face value; nor has the share or interest of any member ever been or intended to be capable of being sold, negotiated or transferred so that the assignee or transferee could succeed to the right of the assignor or transferor to continue in the business of the Company, without the consent of the other members; nor is the share or interest of any member made up of unit shares so as to be divisible. The Paia Plantation has an eighteen-thirty-fifths ($18/35$), the Haiku Sugar Company a twelve-thirty-fifths ($12/35$), and each of the other members a one-thirty-fifth ($1/35$) interest in the partnership; and all profits and losses during the partnership and any assets that the Company may have upon its dissolution, other than the properties above referred to as retained in ownership by its members, are to be divided among them in these proportions. (Tr., pp. 12, 31, 40-41, 43.) The foregoing is a very brief preliminary summary of the facts as we understand them, showing the nature of the organization. They will be discussed more fully below.

When the special excise tax law of August 5, 1909, was passed, the Company, acting on the theory that it was a partnership, made no returns of its income, since, as recognized by the Internal Revenue Bureau, partnerships were not subject to that law; and its constituent members, likewise acting on that theory, made returns each year of their respective shares in the net profits of the partnership, whether distributed or not, which,

as also recognized by the Internal Revenue Bureau, was the proper course to pursue on the theory that the Company was a partnership.

When the law of 1913, now in question, took effect, the same course was continued both by the Company and its members. That law, indeed, expressly provided (Sec. 11, Par. D, fifth proviso) :

“That any person carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid.”

And see Articles 11, 12, 13, 14 and 94 of Regulation 33 of the Internal Revenue Bureau. (Black, Income Taxes, 2nd Ed., 152-3, 183.)

From 1909 until 1916 this course was acquiesced in by the Bureau, and assessments were made by it upon the returns of the partners accordingly.

Furthermore, not only did the Bureau acquiesce in this course, but in 1914 it actually requested the Company to make a statement of its affairs as a partnership for the year 1913 for the information of the Bureau respecting the shares of the partners in the profits of the partnership, and the Company furnished the statement under the following provision of the law of 1913, contained in the same proviso, namely, the fifth proviso of Paragraph D, Section II:

“Any such firm, when requested by the Commissioner of Internal Revenue, or any district col-

lector, shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same, if distributed."

And see the above cited Article 12 of the Bureau Regulation 33.

In 1916, however, the Bureau, acting, as we believe, under the erroneous impression that the Maui Agricultural Company was a joint-stock company, having a capital stock divided into transferable unit shares, like the stock of a corporation, took the position that the Company was not a partnership but was a joint-stock company or association and that there should be a readjustment on that theory for the entire period, beginning with 1909.

As to the law of 1909, the Bureau still conceded that the Company itself was not subject to that law, but now based that view no longer on the ground that it was a partnership, but on the ground that it was a joint-stock company or association of the common law kind and that only those of the statutory kind were subject to that law, as held in *Eliot v. Freeman*, 220 U. S. 178, and *Roberts v. Anderson*, 226 Fed. 7. That, of course, would have been a sufficient reason why the Company would not have been subject to that law even if the Company were a joint-stock company or association. But the correct reason, as we contend, is that it was a partnership, in which case, as conceded by the Bureau, it would not be subject to that law.

And as to the members or partners, under the law of 1909, the Bureau now took the position that, assuming that the Company was a joint-stock company or association and not a partnership, the members were in error in returning their shares of the income earned

by the Company each year, whether distributed or not, and that they should have returned their shares of income actually distributed, whether that was more or less than what was earned in the particular year.

Then, as to the law of 1913, the Bureau took the position that the Company itself was subject to the tax on the theory that it was a joint-stock company or association and that the law applied to joint-stock companies or associations however formed, that is, both those of the common law and those of the statutory kind, and was not limited to those of the latter kind, as was the case under the law of 1909. And as to the partners, it took the position that, under the law of 1913, as well as under the law of 1909, they should return the income actually distributed as distinguished from that earned, whether distributed or not.

The Company, therefore, in order to avoid certain penalties and a distraint on its property and entitle it to the usual remedies of appeal and suit, was obliged to make returns of its income for the years 1913, 1914 and 1915, but, in order to save its rights, it did so under protest. It was then assessed on its income for those years in the sums of \$1,399.22, \$7,113.04 and \$18,589.67, respectively, at the regular rates and also 50% of each of those sums as additional taxes in the nature of a penalty for not having made its returns within the time required by law. These sums plus such 50% additions are the sums set forth on page 2 of this brief as the sums now sued for.*

*The Bureau had no discretion in the matter of the additional 50%, as the law was mandatory in regard to that, but, recognizing that the Company had acted in good faith throughout, it consented to leave in abeyance, awaiting the result of this case, the question of

All things necessary to be done to entitle the plaintiffs to bring this action have been done.

For the matters set forth in the foregoing paragraphs relating to the course pursued by the Bureau and the Company, see Tr., pp. 15-16, 17-24.

imposition of the specific penalty of \$10,000 for each of those years, as to which it had discretion, and it intimated that upon application specific penalties of only nominal amounts might be imposed, in case it should become necessary to pass upon that question, and hence no specific penalty is included in the amounts now sued for.

As to the partners, the result of a readjustment on the theory of the Bureau would be that the partners had underpaid for the years 1909 and 1913 and overpaid for the years 1910, 1911, 1912, 1914 and 1915, the total over-payments being considerably in excess of the under-payments. The amounts involved for the years subsequent to 1909 are comparatively small and the questions involved in regard to those are similar to the questions involved in the present case, and so may well be allowed to rest until the decision of the present case. The amounts involved for 1909, however, are considerable and the questions involved as to those are in large part different from the questions involved in the present case. Hence suits were brought by the United States against the seven members respectively of the Maui Agricultural Company for the determination of those questions, one of which suits, as a test of all of them, was decided by the District Court against the United States and may be brought to this court on writ of error by the United States.

SPECIFICATION OF THE ERRORS RELIED UPON

The plaintiffs rely on all six of the errors assigned (Tr., p. 89), which are in substance as follows:

In general, that the District Court erred in holding that the Maui Agricultural Company was subject to the income tax law of 1913 (5), in holding that the plaintiffs should take nothing by their action (6), in sustaining the defendant's demurrer and ordering judgment for the defendant (1), and entering judgment for the defendant (2); and

In particular, that the District Court erred in holding that the Maui Agricultural Company is a joint-stock company or association within the meaning of the income tax law of 1913 (3), and in holding that that Company is not a partnership within the meaning of that law⁽⁴⁾

The plaintiffs' contentions under these assignments are the three contentions stated at page 3 of this brief, which, as also already shown, may be condensed into the one contention that the Company in question is an organization of a kind not covered by the income tax law of 1913.

THE ARGUMENT

I.

THE PRECISE QUESTION AT ISSUE

(1) *The precise question at issue is whether the*

Maui Agricultural Company is a joint-stock company or a partnership or neither. Distinction between joint-stock companies and partnerships.

As shown by the quotation from Paragraph G of the law on page 2 above, the income tax law, subject to certain exceptions, expressly includes "every corporation, joint-stock company or association, and every insurance company," and expressly excludes "partnerships."

There is no pretense on the part of the Government that the Company in question is an insurance company. It is obvious also that the Company is not a corporation, although as to this, in view of certain suggestions made by the Judge and the United States Attorney, respectively, in the District Court, more will be said at pages 16 and 21 below.

The question, therefore, is whether the Company is a joint-stock company or association on the one hand or a partnership on the other hand within the meaning of the law.

We understand that the phrase "joint-stock company or association" is descriptive of only one class of organizations; in other words, that "joint-stock" qualifies "association" as well as "company." That seems to have been the understanding of all concerned in the District Court. The frame of the sentence, the punctuation and the purposes of the law also all go to show that that was the intention. And this appears to have been the view taken in *Eliot v. Freeman*, 220 U. S. 178, and *Roberts v. Anderson*, 226 Fed. 7, in which similar language in the excise tax law of 1909 was under construction and in which organizations of the "joint-

stock company or association" class were referred to interchangeably as "unincorporated joint-stock companies or associations," "joint-stock companies," "joint-stock associations," etc. See also *Pennsylvania Steel Co. v. New York City R. Co.*, 198 Fed. 774, 776. Hence, for brevity we shall in general use simply the phrase "joint-stock company." It is true that there may be an "association" which is not incorporated by statute and therefore is not a corporation, and which has not a capital stock or transferable shares and therefore is not a "joint-stock company," and which is not formed for profit and therefore is not a "partnership," as, for example, a voluntary organization, without capital stock, formed for scientific, literary, religious, charitable, patriotic or social purposes. But not only are such non-profit organizations excepted from the law under the first proviso of said Paragraph G, but the Company in question is formed for profit and therefore is not such an organization. And in ordinary legal nomenclature, as shown by the authorities cited on page 16 below, "joint-stock company" and "association" are regarded as synonymous terms when speaking of organizations for profit other than corporations on the one hand and partnerships on the other hand.

The distinction between a joint-stock company and a partnership is well established and need not be elaborated here. It is such as to make it clear that the company in question is not a joint-stock company and is a partnership.

Corporations, joint-stock companies and partnerships represent three grades of organizations and the nature of each may be best described by distinguishing it from the others as well as by naming its own characteristics

—as is often done in the text books. Without going into undue detail, suffice it to recall, for the purposes of this case, that a corporation, at the one extreme, is purely a creature of statute and when formed for profit usually has a capital stock divided into unit shares which are transferable. It has continuity irrespective of changes in its membership and is an entity distinct from its members. A partnership, at the other extreme, is organized purely by the agreement of its particular members and has no capital stock divided into transferable shares. A change in membership, as by the death or the transfer of the interest of one of its members, works a dissolution. The legal successor or the transferee cannot become a member without the consent of the other members, and, if such consent is given, it results in creating a new partnership. There is no continuity distinct from the contracting members. A joint-stock company is intermediate between a corporation and a partnership—a hybrid. Like a corporation organized for profit, it has a capital stock divided into shares which are transferable, and hence has continuity irrespective of changes in its membership. Like a partnership, on the other hand, it is created solely by agreement and is not an artificial creation of law. Joint-stock companies are of two kinds, namely, those which are organized under or privileged by statute and those which are not so organized or privileged. The former, which are usually given the privilege of suing and being sued in the name of the organization or of one of its officers, as well as other privileges, are often spoken of as the statutory kind, and more nearly resemble corporations—so much so that

they are often referred to as quasi-corporations. The latter are usually referred to as the common law kind. Since there is no organization for profit intermediate between a corporation and a partnership known to the common law, joint-stock companies are technically deemed to be partnerships. As is said in 1 Bates, Partnership, Sec. 72:

“There is no intermediate association or form of organization between a corporation and a partnership known to the common law, and, unless otherwise provided by statute, as is the case in England and New York, a joint-stock company is treated and has the attributes of a common partnership. Yet the fact of transferable shares makes such an association different, not merely in magnitude but in kind, from ordinary partnerships.”

Hence, in order to distinguish partnerships, other than those which are joint-stock companies, from such companies, they are usually called ordinary partnerships, by which is meant not partnerships of common or usual features, for ordinary partnerships differ much from each other in details, just as joint-stock companies and corporations do among themselves, but that what are ordinarily termed partnerships are not partnerships of the joint-stock kind. The word “ordinary” is used in this respect only when distinguishing what are usually spoken of merely as partnerships from joint-stock companies which, although they are partnerships technically and for certain legal purposes, are not usually called such.

The fundamental distinction between a joint-stock company and a partnership is the existence, in the

one case and not in the other, of a capital stock divided into transferable unit shares. By reason of this, a joint-stock company has, to a certain extent, a distinct entity analogous to that of a corporation, which is well brought out in *Gibbons v. Mahon*, 136 U. S. 549, while a partnership has no such distinct entity, as is well brought out in 1 Lindley, Partnership, *4, and 22 Am. & Eng. Enc. of Law, 2nd Ed., 75. Of course, even an ordinary partnership may be and often is treated, as a matter of form or convenience, as a distinct entity by businessmen or in equity or under special statutory provisions, but in general and legally a partnership does not exist apart from its members. It is simply the members themselves doing business together instead of separately under a contract between themselves and themselves alone. There is a *delectus personarum*, or choice of members. A joint-stock company is the result of an attempt to make a partnership as nearly like a corporation as that can be done by mutual agreement, as distinguished from statute, in respect of membership and continuity.

Other features may more commonly exist in the case of joint-stock companies than in the case of partnerships, but they are not fundamental. Usually joint-stock companies are of much larger membership, but that is immaterial, the essential feature being the fluctuability of membership. Ordinarily, also, they are governed by boards or committees or managers, which naturally is highly convenient because of the number and changeability of the members, but that is immaterial, for ordinary partnerships also may be, and not infrequently are, governed the same way. They more often have a common name.

On the distinction between partnerships and joint-stock companies and questions incidental thereto, see:

- 1 Fletcher, *Cyclopedia Corporations* (1917), Secs. 16, 17.
- 17 Am. & Eng. Enc. of Law, 2nd Ed., 636-8 and notes.
- 5 Earl of Halsbury, *Laws of England*, Secs. 1-2.
- Lindley, *Partnership*, Vol. I, *4-6; Vol. II, *610-613, 661-2, 675; Sec. II, 678-9, 1083 *et seq.*
- 1 Bates, *Partnership*, Secs. 72, 75, 76.
- 2 Bouvier, *Law Dict.*, 3rd Ed., 1704.
- Smith v. Anderson*, L. R. 15 Ch. Div., 247, 273.
- Industrial Lumber Co. v. Texas Pine Land Ass'n*, 72 S. W. (Tex.), 875, 878.
- Roberts v. Anderson*, 226 Fed. 7.
- Flint v. Stone Tracy Co.*, 220 U. S. 107, 144.

Apparently it is because joint-stock companies are so nearly like corporations in the feature of being entities distinct from their members that they are included with corporations for the purposes of the income tax law; and likewise, because of the nature of partnerships as not being entities distinct from their members, that their members, and not the partnerships themselves, are subjected to the tax like other individuals.

(2) *The Company in question is not a corporation.*

Although we have stated above that it is obvious that this Company is not a corporation, and although it was not contended by the Government in the District Court that it is a corporation, still the District

Judge in his decision made several suggestions to the effect that it might be considered a corporation, although apparently he did not intend to decide that it was a corporation. We shall, therefore, dispose of these suggestions before proceeding with the argument upon the question whether the Company is a joint-stock company or a partnership.

First, the Judge, quoting from Blackstone, suggests (Tr., p. 77) that, since persons are either natural or artificial, and since those that are artificial are corporations, and since the Company in question is not a natural person, it must be an artificial person and therefore a corporation, whether it is a joint-stock company or a partnership or not.

But, if the Company is a partnership, it of course cannot be a corporation. Likewise, if it is a joint-stock company of the kind in question, it cannot be a corporation, although there are organizations which are known as incorporated joint-stock companies, which are really corporations. See the next subdivision (3) of this brief. (The joint-stock companies provided for by Hawaiian statutes are full-fledged corporations. Rev. Laws, 1915, Sec. 3272 *et seq.*) Moreover, this Company cannot be a corporation in any event, because it was formed solely by agreement of its members and has not been made a corporation by or under any statute.

The fallacy of the Judge's syllogism, however, lies in the assumption that the Company, assuming it to be a partnership, is a person at all, whether natural or artificial. If it is a partnership, it is not a person at all, whether natural or artificial, but a group of persons indistinguishable from the persons composing it.

Secondly, the Judge, after enumerating what he considers certain features of this Company, with which we do not wholly agree, and referring to the Hawaiian law which permits corporations to form partnerships, suggests (Tr., p. 78), in view of these features and this law, that the Company may be regarded as a corporation, holding that "it is not necessary that it be created as a corporation to make it one in fact, or be called one or that it be chartered as such or even have a charter," and citing 1 Clark & Marshall, Private Corporations, 48; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, and *Oliver v. Liverpool Ins. Co.*, 100 Mass. 531.

But, as already stated, the Company in question is a creature solely of an agreement of its members. It does not even possess any of the special privileges often conferred by statutes elsewhere upon joint-stock companies and which, even though they may make such companies analogous in some respects to corporations, are usually held not to make them corporations. In the cases cited by the Judge, the company was an English company and had been given by statute extensive privileges which, among other things, made it an entity so distinct from its members that it and its members could sue and be sued by each other, and in fact really made it a corporation, and it was held, in view of these features that, although it might not be considered a corporation in England where it was created, it could be considered such within the meaning of a particular tax law of Massachusetts. The entire section in Clark & Marshall, to one page of which reference was

made by the Judge, throws further light in this direction.

Moreover, although corporations of certain kinds, such as ecclesiastical corporations sole, not including, however, corporations for profit, have existed at common law in England and in some of the original states of the United States, on the fiction that a charter had been granted but had been lost in the exigencies of time, yet as a rule not even such can exist in this country apart from statute and certainly not in Hawaii. 1 Clark & Marshall, Private Corporations, Sec. 37; *Bishop of Zeugma v. Paahao*, 16 Haw. 345. Much less could corporations aggregate for purposes of profit exist in this country and especially in Hawaii apart from statute.

The Hawaiian statute permitting corporations to form partnerships did not make the partnerships when formed, corporations. It had to do merely with the powers of the several members and not with the organization resulting from the exercise of those powers, just as a statute permitting infants or married women to form partnerships, that is, removing previously existing disabilities in this respect, would not make the resulting partnerships, corporations. The mere fact that there was, if there was, a statute of some kind that affected the concern would not make it a corporation. Much less would the mere fact that there is a statute that affects the several members make the concern itself a corporation.

Thirdly, the Judge suggests (Tr., p. 78) that even if corporations may form partnerships or joint-stock companies, they cannot thereby take themselves or their business out of the operation of the law; the

idea being, apparently, that they cannot by such action be permitted to evade the law.

But the law must be applied as it is; if the Company does not come within it, it is not subject to it. *Phillips v. Blatchford*, 137 Mass. 510, 512-3. For instance, corporations which merely held investments, including investments as stockholders in or members of other corporations, and did not carry on business themselves, were held not to be within the excise tax law of 1909. *McCoach v. Minehill R. Co.*, 228 U. S. 295; *United States v. Nipissing M. Co.*, 206 Fed. 431; *Jasper & E. R. Co. v. Walker*, 238 Fed. 533; *Butterick Co. v. United States*, 240 Fed. 539.

Moreover, the corporate members of this Company are not taking themselves or their business out of the operation of the law. As partners, they are liable to be taxed on the entire income of the business, and they have always made returns of the entire income, whether all of it was actually distributed to them or not. It is simply a question whether they should be subjected to double taxation by being taxed additionally in the aggregate as well as separately.

Of course, also, this Company was not formed with any intention of evading the income tax law, for it was formed in 1903, or many years before that law, and indeed many years even before the excise tax law of 1909, was enacted or contemplated; and if the partnership in question had not been formed, the several corporate members would not be subject to any greater taxes than they are now subject to individually as partners, and probably not as great, for their net income would probably not be as great.

The partnership was formed for the very purpose of increasing the aggregate net income through co-operation and the common use of the several properties, which were so related to each other that they could be utilized more profitably together than separately.

Again, the suggestion goes too far, since it would apply to ordinary persons as well as to corporations, for both ordinary persons and corporations are subject to income taxes under the law in question, and there is no more reason why a partnership, as distinguished from its members, should be taxed in addition to its members, when the members are corporations than when the members are persons.

The suggestion goes too far also in that it holds, contrary to established law, that corporations, when authorized, as is the case under the laws of Hawaii, to form partnerships, cannot do so without the partnerships so formed being held to be corporations or joint-stock companies, which would nullify, or rather make different, the law.

(3) *The Company in question is not a limited or special partnership.*

It was suggested on behalf of the Government in the District Court that this Company might be considered a limited partnership and that therefore it might be held to be subject to the income tax law as a corporation under Article 86 of Regulation 33 of the Internal Revenue Bureau (Black, Income Taxes, 2nd Ed., 180), which reads as follows:

“Limited partnerships are held to be corporations within the meaning of this act and these

regulations, and in their organized capacity are subject to the income tax as corporations."

There are two kinds of so-called limited partnerships. One kind is really an ordinary partnership between particular individuals but with the statutory modification that some of the partners, upon complying with certain conditions, shall not be liable for the debts of the partnership beyond the amount of capital contributed by them, creditors being obliged to look only to the partnership property and the general liability of the other partners. The special partners are usually also silent partners. The other kind is substantially a corporation having transferable shares and limited liability as to all of the members. 30 Cyc. 752-3. The latter kind may well be considered to be corporations, at least for some purposes. 28 *Op's. Att'y Gen'l*, 189. Perhaps they may be so considered for the purposes of the income tax law. No case has so decided. It would seem, however, that limited partnerships of the other kind could not be so considered. See *Chapman v. Barney*, 129 U. S. 677, 681-2; *Great So. F. P. H. Co. v. Jones*, 177 U. S. 449, 454.

The Hawaiian laws (Revised Laws, 1915, Secs. 3387-3409), provide for limited partnerships of the first kind but under the name of special partnerships. They do not provide for limited partnerships of the second kind. It was suggested on behalf of the Government in the District Court that the Company in question is such a special partnership. The suggestion was based on the proposition that the Hawaiian Act, above referred to, which permits cor-

porations to form partnerships, permits them to form only special and not general partnerships.

But even if the Hawaiian laws permitted corporations to form only special partnerships, and even if this Company had been formed as a special partnership under those laws, it would not be a limited partnership of the kind that could be considered a corporation.

These laws, however, we submit, clearly permit corporations to form either special or general partnerships. The Act which permits corporations to form partnerships, which is Act 51 of the Session Laws of Hawaii of 1903, entitled "An Act Concerning Corporations," provides in Section 1 that:

"Any two or more corporations organized and existing under and in conformity with the laws of the Territory of Hawaii, may enter into partnership with each other, in conformity with Chapter 70 of the Session Laws of 1886."

And Chapter 70 of the Session Laws of 1886 provides in Section 1 that:

"A partnership may be formed between two or more persons for the transaction of any lawful business. A special partnership may be formed between one or more persons, called general partners, and one or more persons called special partners, for the transaction of any business."

Thus these laws provide for the formation of both general and special partnerships. In view of what

is stated in the succeeding paragraphs, we need not enlarge upon this point here. In our brief in the District Court we set forth in full, for the reasoning it contained, a legal opinion rendered to this Company at the time of its formation, holding that the Act in question permitted corporations to form either general or special partnerships, but we deem it unnecessary to encumber this brief in that way. We will only add here that in *Dong You v. Wing Hing Co.*, 22 Haw. 660, 662-3, the Supreme Court of Hawaii took it as a matter of course that the statute permitted corporations to form general partnerships with other corporations, but held that it did not permit corporations to form either kind of partnership with natural persons.

This Company, however, was in fact formed as a general partnership, whether the Act in question permitted it to do so or not. This is shown by the allegations of the complaint and the provisions of the partnership agreement and the by-laws. There is no limited liability; there are no special partners. The provisions of the law specifying the requisites for the formation of special partnerships were not complied with. On the contrary, as already shown, the Company complied with the law relating to general partnerships, namely, Act 28 of the Session Laws of 1880, and it registered as a general partnership under that law.

The Acts of 1886 and 1903, just referred to, are now embodied in Chapter 188, and the Act of 1880 in Chapter 189, of the Revised Laws of 1915.

Now, if the law permitted corporations to form only special partnerships, and if these corporations

did not comply with that law, they became general partners or a general partnership under the very provisions of that law, for that law expressly provides in Section 3393 (referring now to the Revised Laws of 1915), that "no special partnership is formed until the provisions of the preceding three sections are complied with," and in Section 3394 that in case the publication required to be made of the certificate is not made, "the partnership must be deemed general." Sections 3391, 3402, 3404, 3405 and 3406 state other situations in which the partnership will be deemed to be general.

Again, if, as is clear, a special partnership was not formed, and if a general partnership was not formed on the theory that that would be *ultra vires*, then nothing was formed, and there would be nothing to be taxed, and, although the Company might perhaps be estopped from setting up the defense of *ultra vires* as against persons who have dealt with and been misled by a "holding out" by the Company, yet, we submit, it would not be estopped from setting up that defense as against the Government, which has not dealt with or been misled by it, but has sought to impose certain impositions upon it from without.

But, assuming that the defense of *ultra vires* could not be set up and that it is immaterial for the purposes of the tax law whether an organization of any kind has been legally formed or not, and that the question is merely what the organization is in fact, aside from the question of its legality, even if these corporations could not form a general partnership, as matter of law, that would not make them a special

partnership and still less would it make them a corporation or a joint-stock company. They formed a general partnership or nothing in fact. The most that could be contended would be that they formed a general partnership in fact, whether they could in law or not, in which case the Company would be excepted, as a partnership, from the operation of the tax law in question.

II.

THE MAUI AGRICULTURAL COMPANY IS AN ORDINARY PARTNERSHIP.

Bearing in mind that by an ordinary partnership is meant simply a partnership as distinguished from a joint-stock company or association, it is clear that the Company in question is such a partnership from every point of view, and whether positive or negative tests are applied.

Whether the Company is a partnership or not is a question of intention, to be ascertained by the declarations of the parties, their acts and conduct, and the legal effect of the agreement under which the Company was formed. A partnership agreement is subject to the same rules of construction as other agreements. The legal effect of the instrument, of course, controls irrespective of what the parties may call it or what they may think its effect is, if that effect is clearly different from what they call it and what they think it is. But, unless this is clearly different from what the parties declare it to be and show by

their acts and conduct they understand it to be, their declarations and acts and conduct control. In the present case, the declarations, acts and conduct, and the legal effect of the provisions of the agreement, all harmonize and combine to make the strongest possible case for a partnership.

The following general rules are stated in 1 Bates, Partnership, Sec. 17:

“To determine whether the relation between persons constitutes a partnership their intention in forming it governs. * * *

“The declarations of the parties themselves upon the subject, if not inconsistent with the other terms of the contract, will control. * * *

“The intention of the parties will be determined from the effect of the whole contract, regardless of special expressions. * * *

First, as to the declarations of the parties, both in and out of the agreement itself. The parties begin the agreement by describing it as “This Indenture of Partnership” (Tr., p. 28). The provisions of the agreement are arranged according to subject-matter with titles for the several subdivisions, some of which titles read as follows: “Objects of Co-partnership” (Tr., p. 29), “Term of Partnership” (Tr., p. 31), “Partnership Assumption of Debts and Liabilities” (Tr., p. 37), and “Dissolution of Partnership” (Tr., p. 42). The language of the text is equally expressive of an intention to form a partnership. For instance, the recitals state (Tr., p. 29) that the parties “have mutually agreed each with the other to enter into partnership,” and the body of the agreement

states (Tr., p. 29), that "the said parties hereto will, and hereby do associate themselves together as partners." The by-laws, adopted eight months later, refer, as in Articles II, IV and IX (Tr., pp. 44, 49), to the agreement as the "Articles of Partnership." Throughout the agreement and by-laws such expressions are found as "partnership," "this partnership," "said partnership," the "partners," "said partners," "each partner," etc. The printed copy of the partnership agreement and by-laws, published some years later but several years before the present controversy arose, and attached to and made part of the complaint, is entitled on the cover and on the title page, "Partnership Agreement and By-Laws of the Maui Agricultural Company" (Tr., p.27), and the agreement therein is entitled "Partnership Agreement Between the Seven Companies Forming the Maui Agricultural Company" (Tr., p. 28), and the by-laws therein are entitled "By-Laws of the Maui Agricultural Company (a Partnership)." (Tr., p. 45.)

The words erased in the transcript are on the printed copy of the agreement and by-laws but not on the original typewritten copies.

Secondly, as to acts and conduct. The understanding that a partnership had been formed is shown by subsequent acts and conduct, as, for instance, when under the tax laws of 1909 and 1913 the several partners returned, for purposes of taxation, their distributable (larger) shares of the income of the Company as distinguished from the (smaller) amounts actually distributed to them. But, what is of greater significance, their intention to form a partnership is shown by their acts and conduct at the inception of the Com-

pany and in accordance with its formation. For instance, they formed the Company and intended to form it under authority of the Act above referred to, which was passed shortly before and which provided that "any two or more corporations organized and existing under and in conformity with the laws of the Territory of Hawaii, may enter into partnership with each other." And having formed, as they believed, an ordinary general partnership and intending it to have that legal status, they registered it as such under the provisions of the Act, also above referred to, which provided for the registration of co-partnership firms.

Thirdly, as to the legal effect of the partnership agreement. The books usually discuss many features that have been advanced from time to time as tests of partnership or guides to determining the intention of the parties in this respect. Mr. Bates, in Section 24 of his work on Partnership, says:

"The intention of the parties being the sole criterion of partnership, certain principles may be laid down as approximate guides to ascertain it."

He then proceeds to discuss at length certain classes of tests or guides, such as (1) provisions for sharing both profits and losses, (2) provisions for sharing profits with nothing said as to losses, (3) provisions for sharing profits with express provisions against sharing losses, and (4) provisions for sharing gross receipts. He shows that provisions of any of the first three of these classes result in a partnership, and of course that is pre-eminently so of provisions of the

first class, namely, those for sharing both profits and losses, which is the case here. This is the test of the highest grade possible. That a sharing of profits as owners is the true and only test is shown by the very definition of a partnership. See the definitions collected in 1 Lindley, Partnership, *2, and 22 Am. & Eng. Encyc. of Law, 2nd Ed., 13, and notes. It is, however, the character rather than the fact of profit-sharing that controls. 22 Am. & Eng. Encyc. of Law, 2nd Ed., 22, 27. The sharing of the profits must be by the persons as owners or principals and not in some other capacity as, by way of salaries or wages of officers or employes, or interest on loans, or rent under leases, but if there is a sharing as owners the company is a partnership, whether the contributions of the partners are of property or the use of property or services, or whether they are equal or unequal in amount, or whether the profits and losses are to be shared equally or unequally, or whether all the partners are to participate in the management or that is to be left to one or more of them or even to outsiders, and whether they have a common name or not.

The leading American case on this subject is *Meehan v. Valentine*, 145 U. S. 611, in which the court, by Mr. Justice Gray, after stating the rule at the outset and then reviewing numerous authorities on the subject, concluded, on page 623, as follows:

“In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners, who contribute either

property or services to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions.”

We cite this case as one of a series of cases which support and illuminate this proposition, the later cases referring to the earlier ones. The others are:

Ward v. Thompson, 22 How. 330.

Fleming v. Lay, 109 Fed. 952.

Fechteler v. Palm Bros. & Co., 133 Fed. 462.

The foregoing principles are established law in Hawaii. In *Barnes v. Collins*, 16 Haw. 340, the Court, citing *Meehan v. Valentine*, *supra*, and also earlier Hawaiian cases, and finding that there was a partnership, said on pages 342-3:

“What constitutes a partnership is a matter of some diversity of opinion, but in general it may be said that, according to what is called modern doctrine, a partnership exists where the parties have contracted to share, as common owners or principals, the profits of a business and that whether an agreement creates a partnership or not depends upon the intention of the parties.
* * * If the right to share in the profits is merely by way of compensation in lieu of salary or wages performed or of interest for money loaned or of rent for land or of compensation for acting as agent and not by virtue of ownership of the profits, there is not a partnership. The natural inference is, in the absence of a contrary showing, that if one has a right to share in the profits it is because he is a co-owner of the profits. If in addition to a right to share in the profits there is also a liability for losses or expenses the

case is greatly strengthened, for agents or servants or loaners of capital are not usually liable for losses or expenses. Of course there need be no partnership name, nor need it be stipulated that there shall be a partnership, nor is it necessary that the partners should understand or realize what the legal consequences of their agreement will be. The question is whether that which they have agreed upon constitutes a partnership as matter of law; that is, did they agree to become co-owners of the profits."

In *Winkelbach v. Honolulu Amusement Co.*, 20 Haw. 498, the Court, finding that there was not a partnership, said on pages 502-3:

"The agreement is wholly destitute of the usual and ordinary words and expressions, such as 'partnership,' 'partners,' 'profits,' etc., commonly employed in partnership agreements; and the language used fails to disclose, or even to intimate, any community of interest, or co-ownership, or sharing of profits, tending to show the relation of partners."

The agreement in question, after stating (Tr., p. 31), the respective proportionate interests of the several partners, provides (Tr., pp. 40-41) for the sharing of both profits and losses in the same proportions and (Tr., p. 43) for the division in the same proportions of all surplus funds of the Company upon its dissolution—the property the use of which is contributed by the several partners at the outset, remaining their property respectively throughout the term of the partnership (Tr., p. 36) and upon its dissolution (Tr., p. 43). The profits under these provisions

are, of course, shared by the members as owners or principals and not in any other capacity, such as persons who have entered into contractual relations with the Company, whether as employes or creditors or lessors.

Thus, it is as clear as anything can be, from the declarations and acts and conduct of the parties, that they intended to form and believed they did form an ordinary partnership. This actual and expressed intention could be overcome or nullified only by a clear showing that the parties unwittingly used such other language or inserted such other provisions as to produce a legal effect which they did not intend or that they mistook the nature of the arrangement which they intended to make. But so far from there being anything to sustain such a conclusion, the agreement is replete with evidence that its legal effect is precisely what the parties intended. This, indeed, is a most typical case of an ordinary partnership. The evidence is all one way.

It is true that there is, in a sense, a sharing of profits as owners, although this may not be worked out in precisely the same way, in the case of a joint-stock company as well as in the case of an ordinary partnership, and that joint-stock companies, especially those of the common law kind, are technically considered in law as partnerships. But, while a sharing of profits in the case of a voluntary organization for profit is sufficient to make a partnership, it is not sufficient to make a joint-stock company. To make the latter, there is required the additional element of changeability of membership. All definitions of partnership turn on the point of common ownership of profits,

while all definitions of joint-stock companies turn on the transferability of shares. When partnerships are spoken of, ordinary partnerships are usually meant, and when partnerships of the joint-stock company kind are meant they are usually spoken of as joint-stock companies. In the agreement and by-laws in question there cannot be a particle of doubt that a joint-stock company was not meant by "partnership." In these documents also there is nothing whatever, either expressly or by implication, to indicate an intention that the interests of the members should be transferable; much less that there were intended to be transferable unit shares. That would be sufficient to preclude the idea of a joint-stock company, for without such an indication the interests would not be transferable or the membership changeable. These documents, however, go further. They are not merely silent or neutral in this respect. They are full of evidences negating the idea of transferability and showing that the contract of partnership was intended to be solely between the particular parties thereto and no others. This will be shown more appropriately under another heading below.

Counsel for the Government in the District Court urged "agency" as a test of partnership. Even if that were a test and if it showed that the Company in question is not a partnership, it would nevertheless not have the result of making the Company a joint-stock company. We propose, however, to show below that there is nothing whatever in the present case in respect of agency that would prevent this Company from being an ordinary partnership. But, further, agency is not a test of partnership. It was

at one time put forth as such a test, but it has now been discarded, not indeed because mutual agency does not exist in a partnership, but because it results from partnership rather than partnership from it. To adopt that as a test would be to assume the thing to be proved.

Meehan v. Valentine, 145 U. S. 611, 622.
 22 Am. & Eng. Encyc. of Law, 2nd Ed., 23.
 1 Bates, Partnership, Sec. 18.

Counsel for the Government in the District Court relied also largely on the doctrine of *delectus personae*. That is what we rely on and is merely another way of expressing the difference between a partnership and a joint-stock company in respect of changeability or non-changeability of membership. We propose to show below that this is a peculiarly strong case for the application of the doctrine of *delectus personae* because of the positive provisions of the partnership agreement and by-laws inconsistent with the idea of transferability as well as because of the absence of provisions for transferability.

III.

THERE IS NOTHING WHATEVER IN THE
 PRESENT CASE THAT MILITATES
 AGAINST THE MAUI AGRICULTURAL
 COMPANY BEING AN ORDINARY
 PARTNERSHIP.

We have shown affirmatively from the provisions

of the partnership agreement and the declarations and acts of the parties, that this Company is a typical ordinary partnership. We propose now to show negatively that there is absolutely nothing to overcome or rebut this. The arguments offered by the Government in the District Court for the purpose of negating this seemed to center about the three subjects of corporate membership, board management and capital stock. Presuming that similar arguments will be advanced in this court, we will take these up in their order.

1. *The Fact that the Members of the Company are Corporations does not Militate against the Company being an Ordinary Partnership.*

We cannot but feel that the fact that the members of the Company are corporations helped to becloud the situation to the Bureau, or had some effect in throwing the Bureau or its agent off the right track. For, if the members were natural persons, it would seem almost impossible that any one would question the character of the Company as an ordinary partnership. And yet, although it is not very common for corporations to form partnerships, it is obvious that the fact that the members of what would otherwise be an ordinary partnership are corporations, cannot make the slightest difference. The question is not what the members are, but what the Company is.

Either these corporations could legally form an ordinary partnership or they could not. If they could, no argument that they did not in fact form such a partnership can be based on the fact that they are corporations. If they could not, then either noth-

ing was formed, or, if they could not deny that something was formed, it would be only an ordinary partnership *de facto*. The fact, if fact it were, that they could not legally form an ordinary partnership, would not make the organization which they attempted to form as an ordinary partnership something else, such as a corporation or a joint-stock company. Indeed, the same reasons, if any, which would prevent these corporations from forming an ordinary partnership, would likewise prevent them from forming a joint-stock company. See *Merchant's National Bank v. Wehrmann*, 202 U. S. 295, 300-1, in which it was held that a national bank could not become a member of a partnership which in that case was of the common law-joint-stock company kind.

The doctrine of mutual agency in partnerships is unaffected by the fact that the members are corporations. A corporation as well as an individual may act as or through an agent. If the fact that the members are corporations would be inconsistent with the idea of agency, and if that in turn would be inconsistent with the idea of a partnership, then it would follow that corporations cannot form partnerships at all, which is contrary to all the authorities and to the statute of Hawaii above referred to.

Similarly as to the doctrine of *delectus personae*. Particular corporations may enter into an agreement between themselves and themselves alone as well as individuals can. This, as we have seen, is all that this doctrine means. The fact that the membership of each corporate partner may change from time to time through transfers of shares is immaterial. It is the corporations as distinct entities and not their stock-

holders that are the partners. If the fact that the members of each corporate partner may change, would negative the idea of *delectus personae* so as to prevent corporations from forming an ordinary partnership, that would be the equivalent of saying that corporations cannot form ordinary partnerships at all, which, as already stated, is contrary to all the authorities and the statute.

Any argument based on the fact that the members are corporations goes too far. It either leads to a conclusion contrary to established law (that corporations may form partnerships so far as the law or nature of partnerships is concerned), or else to the destruction of the Government's case by showing also that corporations cannot form joint-stock companies.

It is true that ordinarily corporations cannot form partnerships without statutory authority, but that is not because of the nature of a partnership, but because of lack of power on the part of the corporation. If such power is given, or, to put it another way, if the disability is removed, then a corporation may enter into partnership just as a married woman may enter into partnership when her disability to contract is removed. As Bates (1 Partnership, Sec. 1) says:

"While a corporation does not generally have capacity, as we shall see, to become a partner, the reason is not in the nature of the partnership, but in want of power in the corporation, and power being granted in the charter, it may enter a partnership with an individual or another corporation."

See also *Id.*, Secs. 133, 134.
1 Lindley, Partnership, *86.

The reason why corporations may not ordinarily enter into partnership with other corporations or persons is that that is not among the usually implied powers of a corporation, and particularly because a corporation is supposed to be controlled by its stockholders through its directors and officers, while, if it should become a partner, it would, owing to the mutual agency that generally exists among partners, be subject, to some extent at least, to the control of the other partners. See Bates and Lindley, *ubi supra*, and

Fechteler v. Palm Bros. & Co., 133 Fed. 462, 465.

Mallory v. Hanaur Oil Works, 86 Tenn. 598, 604-5.

Dong You v. Wing Hing Co., 22 Haw. 660, 663.

There is, however, nothing inherently unlawful or insuperable in a corporation becoming a partner, and hence the rule that it cannot ordinarily do so yields readily to express or implied provisions in the statute or charter and even to circumstances; for where the reason fails, the rule itself does not apply.

As was said in *News-Register Co. v. Rockingham Pub. Co.*, 86 S. E. (Va.) 874, at 876:

“The law to this effect (that corporations cannot form partnerships) is old and well settled, but not more so than the converse proposition that, when the authority is given, the exercise of such power is entirely competent and valid. This is so because when the power is given in the charter, the reason underlying the rule against its exer-

cise no longer exists. * * * There never has been and is not now any essential illegality in the power of a corporation to form a partnership."

And, as was said in *Morgan v. Child, Cole & Co.*, 47 Utah, 417, at 427:

"The question of whether a corporation may or may not become a partner depends upon circumstances, and whether it, by its charter or statute, is given capacity to do so."

A corporation may be authorized to become a partner expressly by statute, as under the Hawaiian statute above referred to; or expressly by charter, as in *News-Register Co. v. Rockingham Pub. Co.*, *supra*; or impliedly by statute, as in *Butler v. American Toy Co.*, 46 Conn. 136, where a statute incorporating a firm which had been in partnership with another firm, was held to authorize the corporation to continue the partnership; or impliedly by charter, as in *Burke v. Railroad*, 61 N. H. 160, 243-249, where the charter authorized the company to do what was reasonably necessary for accomplishing the objects of its corporate existence (which, however, as the court said, would be the case even if it were not so provided in the charter), and where the court held that whether the corporation could enter into partnership with another railroad company depended upon the question of fact whether that was reasonably necessary, but found in that particular instance that it was not reasonably necessary, since the object could be accomplished just as well in another way. The power

may exist also in the absence of either express or implied statutory or charter authority where the circumstances are such that the reasons for the rule do not apply, as in *Allen v. Woonsocket Co.*, 11 R. I. 288, where that was held on account of special facts, including the fact that there was only one stockholder; or as in *Bates v. Coronado Beach Co.*, 109 Cal. 160, 162-163, where the corporation was to be the sole manager; or as in *Kelley v. Biddle*, 180 Mass. 147, 149, where there was to be a general manager. Some courts have gone even so far as to hold that in the absence of special authority a corporation may enter into a partnership for carrying on a business of the same kind as that for which it was created, as in *Catskill Bank v. Gray*, 14 Barb. 471, 479. In still other cases partnerships between corporations, as in *Lamoille Valley Ry. Co. v. Bixby*, 55 Vt. 235, or between a corporation and an individual, as in *Trustees of Catskill Bank v. Hooker*, 5 Gray, 574, have been recognized without any question being raised as to their validity.

The important thing in this connection is that whether the organization of which a corporation undertakes to be a member is a partnership or not, depends entirely upon partnership law, and is to be determined precisely as it would be determined if all the parties were natural persons. Then, if the organization is found to be a partnership, the further question may arise as to whether the corporation could legally enter into it, and, if not, what is the result under the particular circumstances of the case and with reference to the nature of the questions involved and the way in which they are raised.

As is said in 2 Fletcher, Cyclopaedia Corporations, 1804:

“Whether an agreement actually constitutes a partnership is to be determined by the general rules relating to partnerships, which are the same when a corporation is a partner as when all the partners are individuals.”

This is well illustrated in the following cases to which we call special attention:

In *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, the decision of the Supreme Court of Tennessee was written by Judge Lurton, later of the Supreme Court of the United States. Four corporations entered into an agreement for the formation of what they called a “combination syndicate” and “partnership,” by the terms of which they were to select a committee composed of representatives of the several corporations and turn over to the committee the use but not the ownership of the properties of the corporations to be managed and operated by the committee through officers, agents and employees selected by it, the profits and losses to be shared in certain apparently unequal proportions agreed upon, and this arrangement was to continue for a definite term, and might, by consent, continue for a certain additional period. Afterwards another corporation was admitted, under a provision in the original agreement, making five in all. There could hardly be a case more closely like the present case—corporate members, specified unequal interests, contributions of the *use* of property, management by a board of representatives of the several corporate members, sharing of the profits and losses in

certain unequal proportions, continuation for a definite term. The court said, on page 602:

“A careful examination of this agreement discloses every material element to a contract of partnership. The absolute ownership of the corporate property, the mills, machinery, etc., is not conveyed to the partnership, nor is this necessary. The beneficial *use* of all such property is surrendered to the common purpose. The provisions for the complete possession, control, and use of the properties of the several corporations by the partnership or syndicate is perfect. Nothing is left to the several corporations but the right to receive a share of the profits and participate in the management and control of the consolidated interests as one of the new association. The contract is, both technically and in its essential character, a partnership in so far as it is possible for corporations to form such an association.”

The court, however, held that the formation of partnerships was not among the implied powers of corporations and that the laws of that state did not confer such powers, and hence that the defendant, one of the corporate members, could treat the agreement as void and withdraw from the arrangement and retake possession of its property.

It is clear that if in that state the formation of partnerships by corporations had been permitted by statute, as is the case in Hawaii, the court would have held that the agreement was valid and that a partnership was created. As it was, it held that nothing was legally created, and that the corporate member in question was not estopped from so claiming.

In *Burke v. Railroad*, 61 N. H. 160, already cited,

an organization was formed by two railroad corporations, which contributed the use of their property and were to divide the profits in the proportions of sixty and forty per cent. The organization was to have a general manager and a cashier. This was held to be a partnership, although nothing was said about "partnership" in the agreement, but the court also held that because it was a partnership and because of the absence of sufficient authority to form it, an injunction should issue against continuing it.

In *News-Register Co. v. Rockingham Pub. Co.*, 86 S. E. (Va.) 874, also already cited, two publishing corporations formed an organization for a definite period of ten years, each contributing the use of its property and some cash. Profits were to be shared equally. This was held to be a partnership. It was also held to have been legally formed because the corporations were authorized to enter into partnerships by their charters.

See also the above cited cases of

Morgan v. Child, Cole & Co., 47 Utah, 417.

Fechteler v. Palm Bros. & Co., 133 Fed. 462, and

Dong You v. Wing Hing Co., 22 Haw. 660, for

other instances in which organizations were held to be or not to be partnerships according to partnership laws and irrespective of whether the members were corporations or not, the latter question being deemed of importance only for the purpose of determining the rights and remedies of the parties under the respective circumstances after ascertaining whether the organizations were partnerships or not.

2. *The fact that the Company is managed by a board of managers does not militate against its being an ordinary partnership.*

In the District Court it was argued for the Government and held by the court (Tr., p. 77) that the provisions in the partnership agreement for the management of the Company by a board of managers negated the idea of mutual agency among the members and therefore negated the idea of partnership. This, we submit, has no such effect.

The argument seems to be based partly on the idea that management by a board is a characteristic of a joint-stock company and hence that such management in this case shows that the Company in question is a joint-stock company, and partly on the idea that agency is a characteristic of an ordinary partnership and hence that its contended absence in this case shows that the Company in question is not a partnership. Neither of these views can be sustained on either principle or authority.

Although management by a board is usual, it is not essential in the case of a joint-stock company; and although it is not usual, it may exist in the case of an ordinary partnership. The number and changeability of the members of a joint-stock company usually call for such management as a practical matter in the case of a joint-stock company, while the opposite features in the case of an ordinary partnership usually do not call for that as a practical matter.

It is true that this feature of a joint-stock company is often, though by no means always, referred to in describing joint-stock companies, but, so far as we are

aware, it is never referred to as one of the essential or determining features of a joint-stock company as distinguished from an ordinary partnership. A joint-stock company is always defined with reference to the feature of transferability of shares. Often, it is true, but by no means always, an added statement, not a part of the definition, is made, to the effect that usually, if not always, such a company is managed by a board. Usually other derivative or subordinate features also are referred to. See, for instance, the quotation made by the District Judge from the Century Dictionary (Tr., p. 74). Parsons (1 Contracts, *144-5) says that the English statutory definition of a joint-stock company as "a partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners" is "applicable to such companies in this country" and that "in other respects the differences between the law of joint-stock companies and that of partnerships are not very many nor very important." He makes no mention of the nature of the management. That management by a board does not negative the idea of a partnership, generically speaking, is obvious from the fact that even a joint-stock company, especially of the common law kind, is a partnership.

Moreover, even if management by a board were one of the essential and distinguishing features of a partnership of the joint-stock company kind, it alone would not be sufficient to make a partnership one of that kind, for there would also be required the feature of transferability of shares, which, as we propose to show below, is wholly absent in the present case.

Management or non-management by a board, however, is not fundamental, but is merely matter of form and convenience. Partners, as between themselves, may agree upon almost any form of management they please. Management by a board is not inconsistent with the idea of agency—assuming that there must be agency in the case of an ordinary partnership.

An agreement for management by a board may be looked upon in either of two ways. It may be regarded as merely an agreement among the parties themselves, not binding on third parties dealing with the partners (at least unless they have notice of the agreement), in which case agency would continue to exist, with the result that the partnership would be bound but that the partner who bound it by violating his agreement with the other partners would be liable to them in an action for damages for a breach of the agreement. See 1 Bates, Partnership, Sec. 315; *Morgan v. Child, Cole & Co.*, 47 Utah, 417, 424, 427, cited above: *Burnes v. Pennell*, 2 H. L. Cas. 497, 520-1.

The other way of looking upon an agreement of this kind is to regard it, not as negating the idea of agency, but as constituting merely a delegation of their powers by the several partners to the board of managers. Accordingly, on this principle, almost any sort of arrangement may be made for the management of an ordinary partnership which the partners may desire, and it is so held by the courts. One of the most common methods is that of a managing partner. As is said in 2 Lindley, Partnership, *540-1:

“In the absence of express agreement to the contrary, the powers of the members of an ordi-

nary partnership are in all respects equal, even although their shares may be unequal. * * * It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of their members exclusively of the others."

For cases in which there was a managing partner, see:

McAlpine v. Millen, 104 Minn. 289, 298.

Aller v. Williamowicz, 23 Ark. 566.

Anthony v. Wheatons, 7 R. I. 490, 499-500.

Richard v. Mouton, 109 La. 465.

Ward v. Thompson, 22 How. 330.

Paul v. Cullum, 132 U. S. 539.

Fleming v. Lay, 109 Fed. 952.

In the first of these cases, the *McAlpine* case, the court said, at page 298:

"The management of the business and the extent to which the business shall be conducted and be under the control of any particular partner, is also left to be arranged by the members of the partnership. The sole management may by agreement be vested in one partner."

In the last of these cases, the *Fleming* case, the owners of a number of tugs formed what they called an "association" under the name of the Sandusky Harbor Tug Line and selected a manager (it does not appear whether he was a partner or non-partner) who was to handle all the tugs, collect all the moneys,

pay all the running expenses and distribute the profits of the business among the owners of the tugs in proportion to their values, which were fixed by agreement. There was no express agreement as to losses. Some of the tugs were owned by several persons, but the aggregate owners of each were regarded as one partner. The question was, as stated by the court, "whether the association was a partnership." The court, after applying the test of co-ownership of profits and holding that the organization was a partnership, said on the question of management, at page 955:

"It is not important that the minor stipulations in contracts of partnership vary. The subordinate incidents may differ, but, if the enterprise is aimed to secure a joint profit which is to be divided between those contributing to the business as principals, the distinguishing features of a partnership exist. If it follows from the existence of a partnership that each should have the power of agency, it may be answered in the present case that each has delegated his power in that regard to the general manager, who thereafter by consent exercised the powers of each. Indeed, such delegation of power to a common agent is not an infrequent incident to the business of partnership."

Often other arrangements are made. For instance, one of the partners might be represented by a non-partner, as in *Groth v. Payment*, 79 Mich. 290, 291, where a woman was represented by her brother; or the partnership might be managed entirely by a non-partner, as in *Greend v. Kummel*, 41 La. An. 65, where the partners were natural persons, or as in *Burke v. Railroad*, 61 N. H. 160, cited above, where

the management was by a general manager elected by the directors of the two corporation members of the partnership; or it might be managed somewhat as in the present case, as in *Briere v. Taylor*, 126 Wis. 347, 351, where a partnership was formed by three firms, which were to share the profits in proportion to their respective interests and to share the expenses in the proportion of twelve parts, fourteen parts and sixteen parts, respectively, and the partnership was to be conducted by a president representing one firm, a secretary, who was to act also as treasurer, representing another firm, and an executive committee of three, one member of which was to represent each firm; or, as precisely in the present case, as in *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 602, cited above, where all the partners were corporations and the management was by a board or committee made up of representatives of the several corporate members.

Ordinarily corporations act only through directors, officers or agents. Naturally, therefore, a partnership composed of corporations would be managed by representatives of the corporations and not by the corporations themselves directly as artificial intangible persons. To say that a partnership could not be an ordinary partnership, but would have to be a partnership of the joint-stock company kind, because it is managed by a board composed of representatives of the members instead of the members themselves, would amount to saying either that corporations cannot enter into or form ordinary partnerships at all, which would be contrary to all authority and practice, or else that if corporations should form partnerships they would be obliged, in order to avoid

becoming joint-stock companies, to resort to the impracticable and unreasonable course of having all of their members participate directly in the management of the partnership so formed. Indeed, even that would not obviate the difficulty, for in such case the members or stockholders of the corporations would not be the corporations but would be merely representative of them in the management of the partnership.

Not infrequently partnerships as well as corporations form partnerships among themselves or with individuals, and in such cases for somewhat similar reasons, they are apt to be represented in the partnership so formed by persons selected for the purpose, as in *Briere v. Taylor, supra*. But that does not make the partnership so formed a joint-stock company.

In this particular case, moreover, we desire to call special attention to the fact that under the partnership agreement and by-laws, the management is made as nearly like that of an ordinary partnership managed by all the members as is possible consistently with the fact that the members are corporations. For the members of the board of managers are not elected at large and indiscriminately by majority vote of unit shares, as is usual in the case of a joint-stock company or a corporation, but each member of the board is a special representative of one or more of the particular partners.

For instance, in the agreement (Tr., p. 39), and in Article IV of the by-laws (Tr., p. 46), it is provided that the Haiku Company shall appoint two of the managers, the Paia Company three, and the five

smaller companies one manager jointly. And by the same Article of the by-laws these managers are to "represent" the respective partners by whom they are appointed. And by Article VII of the by-laws (Tr., p. 47), a vacancy in the board is to be filled by appointment by the particular partner which "such manager represents", and similarly in the case of absence.

Under Article III of the by-laws (Tr., p. 45), general meetings of the partnership are to be made up of the entire boards of directors of all of the partners, each partner being thus represented as fully and individually as a corporation can be. And in Article VI of the by-laws (Tr., p. 47), a quorum at such a meeting is to consist of "a majority of the partners, both in numbers and interest," and each corporate member is to have the sole decision as to whether it is properly represented by its board of directors at such meeting.

In Article XVI (Tr., p. 53), the by-laws go even so far as to give the stockholders of each of the corporate members, although they are not partners themselves, the same rights of inspection and examination of the books and records of the partnership and the same rights of investigation into the partnership affairs, that they have in the several corporate members in which they hold stock.

If management by one general manager or by a board of managers representing the members puts a partnership in the joint-stock company class, then all the definitions of joint-stock companies must be revised. Also, if that is the case, then any partnership, even if formed by only two or three individuals and

with their *delectus personarum* most carefully preserved by express covenant against transferability, would nevertheless, if so managed, be a joint-stock company! The argument for a joint-stock company and against an ordinary partnership based on the feature of management by a board, as well as that based on the fact that the partners are corporations, leads too far and defeats itself.

3. *There is an entire absence of the essential features of a joint-stock company, namely, the existence of unit shares and the changeability of membership through mere transfers of such shares; and on the other hand there is present the contrasting characteristic feature of an ordinary partnership, a delectus personarum.*

This is the question of chief importance in the case, for it goes to the real difference between a joint-stock company and an ordinary partnership; and naturally the decision of the District Court turned upon this. That court, as we understand, took the position (Tr., pp. 75-76) that the Company in question has a capital stock divided into unit shares; that these shares are transferable because there is nothing in the partnership agreement or in the law to prohibit their transfer; that any such transfer would carry with it to the transferee the right to participate in the management of the Company and make the transferee a full member of the Company without requiring the consent of the other members; that even if a transfer would not have that effect it would, nevertheless, not operate to dissolve the Company, because the partnership agreement provides that nothing shall work a

dissolution except the mutual consent of the parties to it, and hence that this is a joint-stock company. We submit that not one of these positions is supported either by the partnership agreement or by law.

These propositions have to do with the doctrine of *delectus personarum*, which, of course, simply means choice of persons, or that the contract is between particular persons or corporations and cannot be changed so as to be between others in whole or in part except by the consent of all. In other words, one party to the contract cannot, by a transfer of his interest or otherwise, change the contract. He might break it, but that is a different thing. Besides numerous authorities referred to *passim* in this brief, see Anderson, Law Dict., Tit., *Delectus*; Story, Partnership, Secs. 5, 195; 22 Am. & Eng. Encyc. of Law, 2nd Ed., 15.

The District Judge seems to have assumed that as matter of law a change in the membership of a partnership may be effected by the action of one member without the consent of the others through a transfer of his interest unless there is something in the partnership agreement to prevent. The rule, we submit, is precisely the reverse. This follows from the very nature and definition and characteristics of a partnership. Indeed, it is just here that the difference lies between an ordinary partnership and a joint-stock company. The latter is an ordinary partnership plus the additional feature of transferability or changeability of membership. The non-changeability of membership in an ordinary partnership without the consent of all is an incident of such a partnership, and is not the result of an express agreement to that

effect. The position of the District Judge goes too far, for, if it were correct, all partnerships would be joint-stock companies, unless there were some provision in the partnership agreement against changeability.

True, it is sometimes said that the consent of all to a change may be given in advance as well as at the time or subsequently. That, of course, is so in the case of joint-stock companies, the agreements for which provide for transfers and changes of shares and membership, but it is this very feature that makes it a joint-stock company as distinguished from an ordinary partnership. Sometimes also it is said that consent may be given beforehand to a change even in the case of an ordinary partnership without making it a joint-stock company. That also is true, as where it is specially provided that on the death of a partner his representative may take his place in the partnership, or where special provision is made for the transfer of a partner's interest in certain contingencies, but not only are such cases different from the ordinary cases of changes in membership through the transfer of unit shares, as in the cases of corporations and joint-stock companies, but, strictly speaking, even in such cases it is not the same partnership that continues but a dissolution of the old partnership and the creation of a new partnership. The mere statement, or necessity for the statement, that there may be an express agreement beforehand as well as at the time or afterwards for a change in the membership of an ordinary partnership shows that in the absence of an agreement for a change there cannot be such a change. Mining partnerships are *sui generis*

and require no consent to changes. They are often referred to as differing in this respect from ordinary partnerships. I Bates, Partnership, Secs. 162, 163.

No doubt, also, one partner, without the consent of the others, may transfer his property interest, but that would not result in the introduction of the transferee as a partner in place of the transferor. The transfer would result in a dissolution of the partnership, and the transferee would not even be a tenant in common of the property with the other partners, but would have merely the right to call for a settlement of the partnership affairs and to receive his share of the net proceeds after the payment of debts, and the other partners would retain the exclusive right of control over the property for the purpose of winding up the partnership affairs.

Bank v. Carrollton Railroad, 11 Wall. 624, 628.
Home State Bank v. Vandolah, 188 Ill. App. 123,
 128.

Monroe v. Hamilton, 60 Ala. 226, 231.

Miller v. Brighem, 50 Cal. 615.

Reece v. Hoyt, 5 Ind. 169.

Equally unfounded is the other proposition of the District Judge, that even if a transfer would not have the effect of admitting the transferee as a partner without the consent of the other partners, such a transfer would, nevertheless, not dissolve the company because of the provision in the partnership agreement (Tr., p. 76) that

“The term of the existence of the said co-part-

nership hereby formed, shall be forty-five (45) years, beginning with the 1st day of January, A. D. 1904, unless sooner terminated by the mutual consent of the parties hereto."

Even if this provision would prevent a dissolution notwithstanding the transfer of the interest of one of the partners, still, if such a transfer would not admit the transferee as a partner, the transferor would still be a partner and there would be no change in membership, and the company would still be an ordinary partnership and not a joint-stock company, for the very gist of a joint-stock company is the changeability of membership through the transferability of shares, and not merely the transferability of property interests alone apart from a change of membership. For instance, a partner may mortgage his interest in the partnership without causing a dissolution of the partnership or ceasing to be a partner or making the mortgagee a partner, and, of course, without making the partnership a joint-stock company.

Of course, also, if the transferee in case of an absolute transfer did not remain a partner, as of course would be the case, so that neither the transferor nor the transferee was a partner after the transfer, either a dissolution of the partnership would thereby be effected or else there would continue to be merely an ordinary partnership of the remaining partners. There would not be a joint-stock company. Of course, also, no such results could have been contemplated.

This argument also of the District Judge, based on the fact of a fixed term for the continuance of the partnership, goes too far; for, if it were correct, no

partnership having a fixed term could be an ordinary partnership, and every partnership having such a term would be a joint-stock company, and yet it is common for ordinary partnerships to have fixed terms. See I Bates, Partnership, Sec. 222; 1 Parsons, Contracts, *157. There were fixed terms in the cases of *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1 and 2 years), *Burke v. Railroad*, 61 N. H. 160 (5 years), *News-Register Co. v. Rockingham Pub. Co.*, 86 S. E. (Va.) 874 (10 years), and *Bank v. Carrollton Railroad*, 11 Wall. 624 (25 years), cited above. In *Meaher v. Cox, Brainard & Co.*, 37 Ala. 201, 215, the term was ten years.

What, then, is the significance of the provision in question? In the first place, the latter portion of it, to the effect that the partnership shall continue for the designated period "unless sooner terminated by the mutual consent of the parties hereto" is strongly confirmatory of the idea of a *delectus personarum* and so has the opposite effect from that attributed to it by the lower court. It shows that the contemplated consent in this respect is intended to be the consent not only of all the parties but of the particular seven corporations named as parties to the instrument. If there could be changes in membership through transfers or assignments of their interests by some of the partners, still under this provision the partnership could be terminated within the designated period, not by the mutual consent of the members for the time being, but only by the mutual consent of the original seven parties to the agreement, which, of course, could not have been contemplated and would be absurd. Of course a partnership may be terminated before the

expiration of its specified term by mutual consent without any express stipulation that that may be done, but the fact that a stipulation was inserted that this may be done only by the original parties to the instrument shows that changes in membership through transfers by the several parties, as in the case of a corporation or a joint-stock company, were not contemplated.

As to the first part of the provision—prescribing a fixed term for the partnership—the effect of this, *if any*, upon the question of changeability of membership, would be, not that there might be changes without resulting in dissolution, but that there could not be changes inasmuch as they would result in dissolution.

Just what is the effect of a provision for a fixed term, is a matter of some difference of opinion. As we have seen, it is not that what would otherwise be an ordinary partnership is thereby made a joint-stock company, or that it by implication permits changes in membership without the consent of all the partners. The main object of such a provision is doubtless to provide against a dissolution at mere will, but it does not even have that effect. Its effect is merely that, while any partner may, notwithstanding such provision, effect a dissolution through a transfer of his interest, or at his mere will without such a transfer, that would be a breach of the contract and subject him to liability in an action for damages for the breach unless he had good cause for so doing. Thus such a provision acts as a practical deterrent to a dissolution without good cause and provides a means for compensating the other part-

ners for damages in case of an unjustifiable dissolution. A court of equity also would place some weight on such a provision in deciding whether to decree a dissolution for alleged cause or whether to restrain a dissolution for a reasonable time in order to prevent irreparable damage.

The English rule seems to go to the extent of holding that under such a provision a partner will not be permitted to effect a dissolution at will, and that has the support of Judge Story (Partnership, Sec. 275), but the rule of the Roman Law permitted a dissolution to be effected by one of the partners, notwithstanding such a provision, and this has the support of Chancellor Kent (3 Com. *55). The latter, we submit, has now become the established American rule.

Bates, Partnership, Secs. 243, 577, 578.

22 Am. & Eng. Encyc. of Law, 2nd Ed., 205.

30 Cyc. 651.

These text books, while showing that the decided weight of authority favors dissolubility notwithstanding such a provision, shows also that in a number of jurisdictions in the United States there has been more or less of a leaning the other way. They refer to cases in Alabama, Arkansas, Connecticut, Iowa, Mississippi, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Utah, West Virginia and one United States Circuit Court. But an examination of these cases shows that in the Iowa case the court, although it intimated doubt as to the law, expressed its own view that the rule permitting dissolution was

the more reasonable; that in the Alabama, Connecticut, Mississippi, North Carolina and Ohio cases, the question was not decided, but merely a query was raised or the rule against dissolution was assumed merely for the purposes of the case and held not to apply or was referred to in some other way; that, as shown by the citations below, the later cases in Connecticut, New York, Ohio and Pennsylvania support the rule favoring dissolution, and that the Utah case was reversed on this point on appeal to the Supreme Court of the United States, the decision of which, also, of course, superseded the decision of the United States Circuit Court above referred to, thus leaving practically only Arkansas, New Jersey and West Virginia supporting the English rule.

In support of the Roman and American rule see:

- Karrick v. Hannaman*, 168 U. S. 328.
Maysenburg v. Littlefield, 135 Fed. 184, 187.
Lapenta v. Lettieri, 72 Conn. 377, 383.
Solomon v. Kirkwood, 55 Mich. 256, 259, 260.
Mason v. Connell, 1 Whart. 381, 387.
Sclemmer's Appeal, 58 Pa. St. 168, 176.
Skinner v. Dayton, 19 Johns, 513, 537.
Cockner v. Bruckner, 54 Oh. St. 214.
Cape Sable Company's Case, 3 Bland (Md. Ch.) 606, 674.
Blake v. Dorgan, 1 Greene (Ia.) 537, 540.

Even under the English rule supported by Story it is recognized that, notwithstanding a provision for a fixed term, a partnership is dissolved *ipso facto* by any one of a number of occurrences, such as the death or bankruptcy or (in the case of a woman) the marriage of a partner. Story, Partnership, Sec. 302 *et seq.*

For the same reasons, the disincorporation or forfeiture of the franchise of any of the corporate members of the partnership in question would cause a dissolution. It is also recognized under the English rule that, notwithstanding such a provision, equity may dissolve the partnership for cause. *Id.*, Secs. 275, 282. Furthermore, a distinction is made even under that rule between a dissolution at the mere will of one of the partners and as a result of a transfer or assignment of his interest, which would make it practically impossible or difficult or undesirable to continue the partnership. Accordingly, it is held even under the English rule, that, notwithstanding a fixed term, a dissolution will result from an assignment or transfer of the interest of a partner, thus permitting him to do indirectly what he could not do directly under that rule. *Id.*, Secs. 307, 308; 1 Lindley, Partnership, *230-231.

Thus it is clear that no express provision against changeability of membership is required, as non-changeability is an inherent incident of partnership; and no claim is made for the Government that there is any provision for changeability in this case. It is equally clear that the provision for a fixed term does not carry an implication of changeability. We propose now to show that there is no such implication from the nature of the so-called capital stock of the Company and the shares of its members, and finally that, so far from there being any express or implied sanction of changeability, the partnership agreement contains much that affirmatively shows that no changeability was contemplated.

The Company in question has no nominal or fixed

capital stock as distinguished from capital or capital assets and no unit or equal or nominal or transferable shares. There is nothing comparable to the usual nominal capital stock of a corporation or joint-stock company divided into nominal transferable shares of specified par value, whether paid up or not. Not that the existence of a specified capital stock would prevent this Company from being an ordinary partnership, for such a partnership may and often does have such a capital stock, but this Company does not even have that. It has merely capital, consisting of the user of all of the properties of its several specifically named members, irrespective of their values, which are not specified or even estimated, and of such other properties as it may acquire from time to time by reinvestment of earnings or borrowings or otherwise. Of greater importance, there are no transferable unit shares. There is absolutely nothing to indicate that the Company was formed simply as an impersonal enterprise for profit, irrespective of the make-up of its membership, and with the idea that its membership might fluctuate indefinitely through the sale and purchase and transfer of shares.

It is true that the partnership agreement (Tr., p. 31), speaks of "the capital stock" of the Company and also says that it shall be divided into "Thirty-five (35) equal shares or interests", but it is obvious that, construing the agreement and by-laws as a whole, "capital stock" is here used merely in the sense of "capital" or "capital assets" and that "*shares or interests*" was used merely by way of furnishing a method of expressing the entire proportional indivisible interests of the respective seven particular named

members of the partnership. The same paragraph of the agreement proceeds to state that twelve of these thirty-five shares or interests shall belong to the Haiku, eighteen to the Paia, and one each to each of the other five named members. The paragraph, taken as a whole, is merely a method of stating that the Haiku Company shall have a twelve-thirty-fifths, the Paia an eighteen-thirty-fifths, and each of the other named members a one-thirty-fifth share or interest in the partnership. This is shown, if need be, even more clearly by Article II of the by-laws (Tr., p. 45), which refers to "the respective interests of the partners as set forth in the Articles of Partnership", showing both that the parties concerned had in mind only the proportional entire interests of the partners and that this is the interpretation which they themselves put on the agreement, and which also says that these "respective interests of the partners" shall be evidenced by "*a* certificate" showing that only one certificate was to be issued for the entire interest of each partner. Similarly, Article IV of the by-laws (Tr., p. 46) provides that the managers shall "represent the partners in accordance with their respective interests." As matter of fact no such contemplated certificate for each partner's entire interest has ever been issued, and of course there never was any intention of issuing unit-share certificates. (Tr., p. 13.)

The specifications of the proportional shares or interests of the respective partners in the partnership was evidently made for the purpose of determining the proportions in which the profits and losses are to be shared as specified in the agreement (Tr., pp. 40-41), and the proportions in which the surplus funds,

if any, are to be shared on a dissolution of the partnership as also specified. (Tr., p. 43). See also Subdiv. 7 of Article IX of the by-laws. (Tr., p. 50.) This is just what would be expected in any partnership in which there are unequal interests. See 2 Lindley, Partnership, *610, 611; 30 Cyc. 440. Several of the cases already cited illustrate this. For instance, in *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, the shares or interests were in certain proportions agreed upon, where only the use of the properties was contributed by the several corporate members of the partnership, as in the present case. In *Briere v. Taylor*, 126 Wis. 347, where the partners were firms instead of corporations, the proportions were twelve parts, fourteen parts and sixteen parts, respectively. In *Paul v. Cullum*, 132 U. S. 539, the proportions were eight-tenths and two-tenths, respectively. In *Meaher v. Cox, Brainard & Co.*, 37 Ala. 201, where two firms formed a partnership, one to contribute the use of ten steamboats, and the other of two steamboats, each to retain the ownership of its vessels, the proportions were four-fifths and one-fifth, respectively.

The difference between the so-called capital stock of a partnership and of a corporation or a joint-stock company is set forth to some extent in 2 Lindley, Partnership, *610-613, 660-661, 675-678. In the case of a partnership the share of a partner is merely his proportional interest, while in the case of a corporation or joint-stock company, there is a specified nominal capital stock divided into unit shares which are transferable and which may or may not be paid up.

“Capital stock” may be used in several senses. It may mean nominal capital or actual capital or various

other things. Here it means actual capital in the sense of capital assets. "Capital" and "capital stock" are often used interchangeably or synonymously in this ~~case~~^{sense}, although, strictly speaking, when used with reference to corporations they should be distinguished to some extent. For instance, in *State v. Cheraw & Chester R. Co.*, 16 S. C. 524, the court said, at page 528:

"Capital stock and capital are synonymous terms, hence capital stock. In this general sense it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or a government; and it makes no difference how the money is obtained, whether by labor, by borrowing or otherwise."

The court then proceeded to point out that when used in connection with corporations capital stock has a more limited sense. See also.

Foster v. Stevens, 63 Vt. 175, 182.

Kohl v. Lilienthal, 81 Cal. 378, 385.

Goodnow v. American Writing Paper Co., 73 N. J. Eq. 692, 695.

A case in which the Federal Supreme Court used "capital stock" and "capital" interchangeably in the case of a corporation is *Scottish Union & Nat. Ins. Co. v. Bowland*, 196 U. S. 611, 627. A case in which the same court used these terms interchangeably in the case of a partnership is *Paul v. Cullum*, 132 U. S. 539, 548-550.

That "capital stock" is used in the sense of capital

in the present case is shown further by the paragraphs following the paragraph in question and specifying the contributions of the several partners to the so-called capital stock. (Tr., p. 32.) For instance, the first of these paragraphs is entitled "Kalialinui contribution to *capital*." The paragraph itself states that the Kalialinui Company "shall contribute as its share toward the capital stock of the said company, the use during the term of the said partnership of all of its" property, etc. Kalialinui's share is what it contributes. It is the use of all of its property irrespective of its value. There is no subscription or payment for shares. The use of property is contributed, not in payment for capital stock, but toward or as a part of the capital stock. Capital stock in this instance means merely stock of capital. The fact that only the use of the property is contributed instead of the property itself and that each partner continues in the ownership of its property makes this additionally clear.

So much as to the nature of the "capital stock" and the "shares or interests" therein. Now as to transferability. If there is any one thing that is clear in this case, it is, we submit, that the respective shares or interests of the several partners are not transferable so as to enable transferees to become members of the partnership. Not only is there an entire absence of any provision for transfers, as there always is, so far as we have observed, in the articles of association of a joint-stock company, but the agreement and the by-laws are full of evidences that the partnership contract in this case was intended to be exclusively between these particular corporations and no others. Not only that, but it is shown in the complaint (Tr.,

p. 14) that the partnership was formed "in view and by reason of identity in large part of the shareholders of the several or individual corporate partners or members and the close and special relations between and among them", and also, after setting forth that each partner contributed only the use of its property, that the partnership was formed "in view and by reason of natural and special relations of the said several properties to each other", and the agreement itself, in its first recital (Tr., p. 29), sets forth that "*the parties hereto are the owners respectively of certain lands and water rights and personal property hereinafter more particularly described, * * which said rights and property, owing to the location and situation thereof can more profitably and advantageously be operated in common than by each party hereto separately.*" Thus, the agreement is between these particular corporations alone for special personal and property reasons and for the use in common of their respective particular properties, the ownership of which is to be retained by them.

The agreement is between these corporations by name and each named corporation is the "Party of the First Part" or "Party of the Second Part", etc., (Tr., p. 28). The partners are referred to time and again as "the said partners", meaning these corporations. They are not referred to as the members or shareholders or stockholders of the Company. There is no definition to the effect that words descriptive of these corporations shall include their assigns. There is no provision specifying that transfers may be made or how transfers may be evidenced. As already stated, it is stipulated that the partnership may be dissolved

within its specified term only by the "mutual consent of *the parties hereto*". (Tr., p. 31.) As also already stated, a twelve-thirty-fifths interest "shall belong to Haiku", an eighteen-thirty-fifths to Paia, etc. (Tr., p. 31.) The profits and losses are to be borne in the proportion of twelve-thirty-fifths *by Haiku*, etc., (Tr., p. 40). Likewise, the surplus, if any, on dissolution is to go twelve-thirty-fifths *to the said Haiku*, etc., (Tr., p. 43). Under the agreement (Tr., p. 39) and Articles III, IV, VI and VII of the by-laws (Tr., pp. 45, 47) the managers are to be appointed by these particular corporate members by name, and vacancies and absences are to be filled by the particular partner or partners represented by the manager who is absent or whose office is vacant, and each of these partners is to be represented at general meetings of the partnership by its board of directors and is to determine whether it is properly represented by its board of directors. If the share or interest of any partner were transferable and should be transferred, the transferor, under the agreement and by-laws, would still have the authority to appoint its representative or representatives on the board of managers and otherwise to take part in the management of the partnership, while the transferee, if entitled to anything, would be entitled to only its proportion of the profits and losses, but it is difficult to see how it could be entitled even to those, for the provisions on that subject are that the profits and losses "shall be borne *by the parties hereto*" and also "in the proportion of twelve-thirty-fifths (12/35) *by the said Haiku Sugar Company*, eighteen-thirty-fifths (18/35) *by the said Paia Plantation* and one-thirty-fifth (1/35) *by each*

of the said Parties of the Third, Fourth, Fifth, Sixth and Seventh Parts." (Tr., p. 40.)

Throughout also it is manifest that only corporations were contemplated as partners, and yet, if the shares or interests of these corporate partners were transferable, they could be transferred to individuals as well as to corporations, and there is no provision in the agreement or by-laws for the appointment of any managers by individuals, not to mention other difficulties that would arise. Furthermore, as already shown and as alleged in the complaint (Tr., p. 13), the interests of the respective partners are not divisible. For instance, the Haiku Company with twelve-thirty-fifths could not split its interest and transfer, say, one thirty-fifth. If it could do that, there would be further difficulties, as, for instance, suppose it transferred one thirty-fifth to one person, five thirty-fifths to another and seven thirty-fifths to a third, how would the two members of the board of managers to be appointed by the Haiku Sugar Company thereafter be appointed; and under Article III of the by-laws, how could any such transferee, particularly if an individual, be represented at a general meeting of the partnership; and under Article VI of the by-laws, since a majority of the partners in both number and interest constitute a quorum, if the Paia Company should sell its eighteen-thirty-fifths to eighteen different persons, the transferees of that partner alone would be a majority in both number and interest and thus could absolutely control the partnership, contrary to the intention of this provision. Article VIII of the by-laws, moreover, provides that notice of meetings shall be served upon each director of each of the

respective partners, etc. Article XX provides for amendments of the by-laws in certain respects only "by a nine-tenths vote of all of the stockholders of each and every partner corporation."

If there ever was an agreement that was intended to subsist between the parties to it alone and not to contemplate that any single party might itself, and against the consent of the others, substitute another or others in its place, this, we submit, is such an agreement.

IV.

THE STATUTE SHOULD BE CONSTRUED LIBERALLY IN FAVOR OF THE TAX PAYER.

In the District Court opposing counsel cited *De-Ganay v. Lederer*, 239 Fed. 568, 571, 572, (decided by a District Judge), in support of the views that in the construction of a statute considerable weight should be given to the position taken by the executive and that ^{tax} the statutes should be liberally construed in favor of the Government.

The District Judge in that case cited no authorities for these views and also stated in effect that these views did not help much, since the question after all was that of the construction of the statute, which of course was for the court.

On the question as to what weight should be given to the view taken by the executive, we submit that that depends upon how doubtful or evenly balanced is the question of the meaning of the statute, upon

how long and to what extent the construction given by the executive has been acted upon and acquiesced in, and to what extent hardships might or might not result from a change in the construction. See *Houghton v. Payne*, 194 U. S. 88, 99; *Studebaker v. Perry*, 184 U. S. 258, 268; *United States v. Tanner*, 147 U. S. 661, 663; *McNally v. Field*, 119 Fed. 445, 448. If the courts were to be bound by the views of one of the parties to the controversy—the executive—of what use would it be for the other party to go to the courts? Fortunately, under our system of government, the construction of statutes is left to the judicial branch. Numerous cases might be cited in which the courts have overruled the Bureau under the Federal income and corporation tax laws. In *Eliot v. Freeman*, 220 U. S. 178, the Federal Supreme Court overruled the Bureau on the question as to what companies were covered by the law of 1909, which is the question involved in this case under the law of 1913. And see *Edwards v. Keith*, 231 Fed. 110, 113 (petition for certiorari denied, 243 U. S. 638). In the present case, however, if the rule advocated by the other side has any application, it is favorable to the Company, for the Bureau took the position now taken by the Company from 1909 to 1915 (see p. 6 above), and changed its view only in 1916 and then, as we contend, only because of an erroneous impression as to the facts.

On the question of liberal construction, it is the established view of the Federal courts that tax laws should be construed liberally in favor of the tax payer and especially as to exceptions named in such statutes. *Eidman v. Martinez*, 184 U. S. 578, 583; *State of*

Ohio v. Harris, 229 Fed. 892, 898; *Rockefeller v. O'Brien*, 224 Fed. 541, 546; *Mutual Ben. L. Ins. Co. v. Herold*, 198 Fed. 199, 201. Here partnerships are expressly excepted. The specific controls the general in such laws. *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 474. Courts also lean strongly against constructions which would result practically in double taxation. *Tennessee v. Whitworth*, 117 U. S. 129, 137. This has special application to the present case.

V.

MISCELLANEOUS.

1. *Interest*. Interest should be allowed from the date of the payment of the taxes under protest, September 8, 1916. See

Ersine v. Van Arsdale, 15 Wall. 75.
Shell v. Cochran, 107 U. S. 625.
National Home v. Parrish, 229 U. S. 494.
Billings v. United States, 232 U. S. 261.
Kinney v. Conant, 166 Fed. 720.
Herold v. Shanley, 146 Fed. 20.

2. *Costs*. Similarly, costs are allowed in cases of this kind against collectors of internal revenue. For example, see

Industrial Trust Co. v. Walsh, 222 Fed. 437.
Baldwin Locomotive Works v. M'Coach, 215 Fed. 967.

On both interest and costs see also Black, *Income Taxes*, Sec. 384.

3. *Proper party defendant.* Although a suit may be brought against the United States for the recovery of taxes illegally collected (*Emery, Bird, Thayer R. Co. v. United States*, 198 Fed. 242, 249; *Christio Street Co. v. United States*, 136 Fed. 326), it may also, and usually is, brought against the collector. Treasury Decision 2394. But the suit in cases of this kind is against the collector personally, although the Government is to pay the judgment, and hence not only can it not be brought against his successor, but, upon his death after suit brought, his executor or administrator and not his successor should be substituted in his place. *Patton v. Brady*, 184 U. S. 608; *Roberts v. Lowe*, 236 Fed. 604; *Philadelphia H. & P. R. Co. v. Lederer*, 239 Fed. 184, affirmed 242 Fed. 492.

In this case the suit was brought against the collector to whom the taxes were paid (Tr., p. 2), but he died on August 10, 1917, and the executor of his will was substituted for him.

In conclusion, we respectfully submit that the judgment of the District Court should be reversed and the case remanded to that court with instructions to enter judgment for the plaintiffs for the amount claimed, with interest and costs.

Dated at Honolulu, T. H., January 29th, 1918.

Respectfully submitted,

FREAR, PROSSER, ANDERSON & MARX,
SMITH, WARREN & WHITNEY,
Attorneys for Plaintiffs.

United States Circuit Court of Appeals

For the Ninth Circuit

HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED AND KAILUA PLANTATION COMPANY, LIMITED, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME OF MAUI AGRICULTURAL COMPANY,

Plaintiffs in Error,

VS.

RALPH S. JOHNSTONE, EXECUTOR UNDER THE WILL AND OF THE ESTATE OF JOHN F. HALEY, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF THE TERRITORY OF HAWAII,

*Defendant in Error.***BRIEF OF DEFENDANT IN ERROR**

Upon Writ of Error to the United States District Court for the Territory of Hawaii

JOHN W. PRESTON,

United States Attorney for the Northern District of California.

CASPER A. ORNBAUN,

Asst. United States Attorney for the Northern District of California.

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Attorneys for Defendant in Error.

Filed this.....day of February, 1918.

FRANK D. MONCKTON, Clerk,

No. 3090.

IN THE

United States Circuit Court of Appeals

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HAIKU SUGAR COMPANY, PAIA PLANTATION, KALIALINUI PLANTATION COMPANY, LIMITED, PULEHU PLANTATION COMPANY, LIMITED, KULA PLANTATION COMPANY, LIMITED, MAKAWAO PLANTATION COMPANY, LIMITED AND KAILUA PLANTATION COMPANY, LIMITED, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME OF MAUI AGRICULTURAL COMPANY,

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiffs in error are all corporations, and were plaintiffs in an action in the District Court of the Territory of Hawaii to recover from one

John F. Haley, Collector of Internal Revenue of Hawaii, the sums of \$2,098.83, \$10,669.56 and \$27,884.51, aggregating \$40,652.90, paid under protest by said plaintiffs in error on September 8, 1916, as income taxes for the years 1913, 1914 and 1915 under the Federal Income Tax law of October 3, 1913.

The action was brought by said plaintiffs in error as copartners doing business under the firm name Maui Agricultural Company, and the only question of importance to be determined to ascertain whether or not the plaintiffs in error are subject to the tax imposed by the Government is whether the Maui Agricultural Company is a partnership. If it is a partnership, and the complaint states sufficient facts to constitute a cause of action, then the plaintiffs in error should succeed, otherwise the lower court pursued the right course in sustaining the government's demurrer.

Since the plaintiffs in error chose to stand upon the complaint, all of the facts to be considered in determining this appeal appear in said complaint. (Tr. pp. 9-56.)

ASSIGNMENTS OF ERROR.

It is claimed first that the Court erred in sustaining the demurrer of the defendant to the complaint of the plaintiffs, and in ordering judgment for the defendant.

II.

That the Court erred in entering judgment for the defendant and against the plaintiffs.

III.

That the Court erred in holding that the plaintiffs herein, doing business under the name of the Maui Agricultural Company, are a joint stock company or association within the meaning of Paragraph "G" of Section II of the Act of October 3, 1913.

IV.

That the Court erred in holding that the plaintiffs herein, doing business as the Maui Agricultural Company, are not a copartnership within the meaning of Paragraph "G" of Section II of the Act of October 3, 1913.

V.

That the Court erred in holding that the plaintiffs were subject to the tax imposed by Paragraph "G" of Section II of the Act of October 3, 1913.

VI.

That the Court erred in holding that the plaintiffs take nothing by their said action.

ARGUMENT.

The opinion of the Honorable Horace W. Vaughan (Tr. p. 65) briefly surveys the whole sit-

uation, and on pages 66 and 67 of said transcript he says:

“The question in the case is whether or not paragraph “G” of Section II of the Act of October 3, 1913, required by levy and assessment against the Maui Agricultural Company of the tax which said paragraph provides ‘shall be levied, assessed,’ etc., against ‘every corporation, joint stock company or association and every insurance company, organized in the United States, no matter how created or organized, not including partnerships.’ And the determination of this question depends upon whether the Maui Agricultural Company is a corporation or a joint stock company or association within the meaning of paragraph “G” of Section II of the Act of October 3, 1913, or is a ‘partnership’ within the meaning of the word as used in said paragraph of said Act. If it is neither a corporation nor a joint stock company or association, the paragraph imposes no tax upon it; if it is a ‘partnership’ within the meaning of the word as used in the paragraph it is not subject to the tax. It becomes necessary, therefore, to ascertain the meaning of the paragraph as affecting the question involved, and also to determine what kind of creature the Maui Agricultural Company is.”

Before going into the merits of the question concerning whether or not the Maui Agricultural Company is or is not a partnership, the government desires to attack the complaint as failing to state

sufficient facts to constitute a cause of action against the defendant in error, in this: There is no allegation in said complaint showing that the said corporations, and each of them, possessed the authority and right, through their, and each of their charters or articles of incorporation, to enter into a copartnership agreement or otherwise associate themselves as copartners, and the general rule is that a corporation has not such power, unless expressly authorized.

1831, *Sharon Canel Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412;

1858, *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582, 71 Am. Dec. 681;

1862, *Marine Bank v. Ogden*, 29 Ill. 248;

1885, *Gunn v. Central R. Co.*, 74 Ga. 509;
News Register Co. v. Rockingham Pub. Co., 86 S. E. 874;

1890, *People v. North River Sug. R. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843,
supra p. 100;

1895, *Aurora Bank v. Oliver*, 62 Mo. App. 390;

1897, *Sabine Tram Co. v. Bancroft*, 16 Texas Civ. App. 170, 40 S. W. Rep. 837;

1899, *Merchants' Nat'l Bank v. Standard W. Co.*, 6 Ohio N. P. 264;
 Bates 1, Partnership, Sec. 1;
 1 Lindley, Partnership, Sec. 86.

The mere fact that the laws of Hawaii permitted corporations to combine for the purpose of forming a copartnership, does not indicate that the charters or articles of incorporation of each of the respective corporations give them sufficient power to organize and participate in copartnerships. It was therefore necessary that the complaint specifically allege facts to show that each of said corporations possessed the power, through their respective charters or articles of incorporation to organize a partnership and participate in its activities, and that the action of said corporation was not *ultra vires*.

The pleadings in this case, as in all other cases, are to be construed most strongly against the pleader.

31 Cyc. pp. 78, 79, 81 and 82 and cases cited, and since it was material in this case for the plaintiffs in error to show that said corporations and each of them possessed sufficient power through their respective charters to organize a partnership, a failure on the part of the complainant to allege this material fact gives rise to the presumption that the said charters did not grant sufficient power.

Frantz vs. Patterson, 123 Ill. App. 13;

Cannon vs. Castleman, 162 Ind. 6, 69 N. E. 455;

Hughes vs. Murdock, 45 La. Ann. 935, 13 So. 182;

Chicago, etc., R. Co. vs. Shepherd, 39 Nebr.
523, 58 N. W. 189;

Stillings vs. Van Alstine, 2 Nebr. 684, 89
N. W. 756;

Marsh vs. Marshall, 53 Pa. St. 396.

The next and important question is to determine whether the Maui Agricultural Company is a partnership, or is it to be classed as a corporation, joint stock company or association, and subject to the income tax law of 1913.

While the Maui Agricultural Company has practically all of the characteristics of a corporation, technically speaking, it is not a corporation, as it is not a legal entity brought into existence by a sovereign power through legislative action and clothed with a charter, but is the result of an express agreement, (Exhibit "A", p. 28 Tr.) and supplemented with by-laws (Exhibit "B", p. 45 Tr.), both of which are framed along the same lines and in all respects analogous to the articles of incorporation and by-laws of an ordinary corporation.

An examination of the authorities show that the line of demarcation between a corporation and a joint stock company is not a very distinct one. They are so much alike in fact, that the joint stock company is sometimes called a *quasi* corporation.

Oak Ridge Coal Co. vs. Rogers, 108 Pa. St.
147,

1 Morawetz Corporation, Par. 6.

In volume 23 Cyc., page 23, the author states that

“The difference has become obscure, elusive and difficult to describe”,

and then the author calls attention to a distinction by stating as follows:

“A corporation on the one hand is an artificial entity brought into existence by the sovereign power of the state, and the individual liability of its members is completely eliminated unless some part of that liability is expressly preserved by constitutional or statutory provision; while a joint stock company, on the other hand, is formed by a written agreement of individuals with each other, and its whole force and effect, in constituting and creating the organization, rest upon the common-law right and power of the individuals to contract with each other; the relation they assume is wholly the product of their mutual agreement and depends in no respect upon any grant of authority from the state; and hence the individual personal liability of the members remains intact unless there is express statutory authority for its elimination.”

Generally speaking, the above distinction is as clear as can be drawn from any of the decisions rendered by the courts or from the texts written by eminent authors upon the subject and an examination of said agreement and by-laws of the Maui Agricultural Company will show that they, and each of them, meet every requirement of the above definition.

But can the Maui Agricultural Company be classed as a partnership, and if not, what distinction is there between a joint stock company and a partnership?

In discussing the law of partnerships in *Mechems Element of Partnership*, the author, on page 1 thereof, says that

“Any attempt to frame a satisfactory definition of partnership is probably a somewhat hazardous undertaking. This is partly owing to the difficulty inhering in any attempt at definition, but it is chiefly attributable to the fact that the legal conception of partnership has not always been clear and definite, and that the legal test for determining the existence of the relation has varied from time to time. Mr. Justice Lindley, in his admirable treatise upon the subject, declines to attempt a definition, saying that to frame one ‘which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition.’ ”

The same author, on pages 2 and 3 of the same text, gives the principal characteristic elements of a partnership as follows:

- “1. It is an unincorporated association or legal relation.
2. It is created not by law but by the agreement of the parties.
3. It requires two or more competent parties.

4. It involves the establishment of a common stock, fund or capital of some sort by the union of the several contributions of the parties.

5. It contemplates the transaction of some lawful business, trade or occupation, which the parties to own and carry on as principles.

6. The purpose of the union is the pecuniary gain of the members."

and on page 6 of the same text, the author, in drawing a distinction between a partnership and a corporation, further defines a partnership as a—

"voluntary, unincorporated association of individuals whose legal relation is based upon their agreement, and needs no special statutory authority to give it force and effect. They continue to act in this relation as individuals. They sue and are sued only in their individual names. The death of one operates usually to terminate the relation. The transfer of the interest of one has usually the same effect, and operates, not to introduce the transferee into the relation, as a party to it, but merely to give him such share as his transferer would have upon a dissolution. Each partner is, in general, personally responsible for all the debts of the partnership, notwithstanding that he has fully paid in to it his agreed contribution."

A joint stock company is defined in Volume 23 Cyc., page 467, as follows:

"A joint stock company is an association of individuals for purposes of profit, possessing a

common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more, and which are transferable by the owner."

Exhibit "A" (P. 31 Trans.), which represents the agreement between the corporations, composing the Maui Agricultural Company, provides as follows:

"Division of Capital Stock.

The capital stock of the said company shall be divided into thirty-five (35) equal shares or interests, of which twelve (12) shall belong to the said Haiku, eighteen (18) to the said Paia, and one (1) each to the said Kalialinui, Pulehu, Kula, Makawao, and Kilua."

and Exhibit "B" (P. 45 Trans.), which represents the by-laws of the said Maui Agricultural Company, contains the further provision, as follows:

"The respective interests of the partners as set forth in the Articles of Partnership shall be evidenced by a certificate in such form and device as the Board of Managers may adopt."

It can readily be seen from the portions of the agreement and by-laws of the Maui Agricultural Company, as quoted above, that each corporation had a certain specific interest in said company to be "evidenced by a certificate in such form and device as the Board of Managers may adopt."

Counsel representing plaintiffs in error, in their brief, pp. 14 and 15, state as follows:

“The fundamental distinction between a joint stock company and a partnership is the existence, in the one case and not in the other, of a capital stock divided into transferable unit shares. By reason of this, a joint stock company has, to a certain extent, a distinct entity analogous to that of a corporation, which is well brought out in *Gibbons v. Mahon*, 136 U. S. 549, while a partnership has no such distinct entity, as is well brought out in 1 *Lindley, Partnership*, 4, and 22 *Am. & Eng. Enc. of Law*, 2nd Ed., 75. Of course, even an ordinary partnership may be and often is treated, as a matter of form or convenience, as a distinct entity by business-men or in equity or under special statutory provisions, but in general and legally a partnership does not exist apart from its members. It is simply the members themselves doing business together instead of separately under a contract between themselves and themselves alone. There is a *delectus personarum*, or choice of members. A joint stock company is the result of an attempt to make a partnership as nearly like a corporation as that can be done by mutual agreement, as distinguished from statute, in respect of membership and continuity.”

The foregoing distinction meets with my approval and the government respectfully submits that a reading of the said agreement and by-laws of said Maui Agricultural Company will show that the

latter is a joint stock company and not a partnership. The said agreement covers every material point that should be covered in the usual articles of incorporation, and the said by-laws might well represent those of any corporation. In fact, on pages 54 and 55 Trans., Article 14, the word "corporation" is used and no doubt the by-laws were taken from those used by corporations as the similarity is so great.

Is the certificate which represents the respective shares of the various corporations which compose the Maui Agricultural Company transferable, and is there anything in the articles of agreement (Exhibit "A") or the by-laws that would indicate that there is a *Delectus Personarum*, or choice of members? An examination of said agreement and by-laws will show that there is no provision in either that would prevent said corporations or either of them, which compose the said Maui Agricultural Company, from disposing of their, or each of their certificates of interest and "where the articles of an association are silent on the subject, certificates of stock may be transferred at the pleasure of the holders."

23 Cyc. p. 473;

Alvord vs. Smith, 5 Pick. (Mass.) 232;

Butterfield vs. Beardsley, 28 Mich, 412.

To further illustrate the similarity between joint stock companies and partnerships, the government

again quotes from page 7 of Mechem's Elements of Partnership, in which the author states:

“In many of the states, statutes have provided for the organization of associations partaking more or less of the characteristics of both partnerships and corporations. Thus, there are joint stock companies, which usually are simply partnerships with transferable shares.”

In fact, the rule is clearly stated on page 46 of counsel's brief, which the government now quotes, as follows:

“See, for instance, the quotation made by the District Judge from the Century Dictionary (Tr. p. 74.) Parsons (1 Contracts, Sec. 144-5) says that the English statutory definition of a joint stock company as a ‘partnership, whereof the capital stock is divided into shares, or agreed to be divided into shares, and so as to be transferable without express consent of all the copartners’ is applicable to such companies in this country, and that ‘in other respects, the differences between the law of joint stock companies and that of partnerships are not very many nor very important.’”

As above stated, each of the corporations composing the Maui Agricultural Company, owned a certain specific interest in the latter, and the by-laws of said Maui Agricultural Company specially provided that said interest was to be “evidenced by a certificate in such form and device as the

Board of Managers may adopt"; and, as stated *supra*, inasmuch as said agreement and by-laws of the Maui Agricultural Company placed no restrictions upon the sale of said certificates of interest, said certificates could be transferred, and thus the Maui Agricultural Company possesses all of the attributes of a joint stock company.

The stockholders of a joint company are personally liable except in so far as such liability may be limited by statute or special agreement for the debts of the company precisely as general partners are liable for the debts of the firm.

23 Cys. p. 474 and cases cited.

Here again the Maui Agricultural Company qualifies as a joint stock company, as the agreement specifically provide (Tr. p. 40) that—

“All losses incurred by the company, if any, shall be borne by the parties hereto in the proportion of twelve thirty-fifths (12-35) by the said Haiku Sugar Company, eighteen thirty-fifths (18-35) by the said Paia Plantation and one thirty-fifth (1-35) each by the said parties of the Third, Fourth, Fifth, Sixth and Seventh Parts.”

Morawetz says:

“Joint stock companies may be cited as quasi corporations of a private character. They are associations having some of the features of an ordinary common law copartnership, and

some of the features of a private corporation. 1 Morawetz Corp. Sec. 6.”

“As defined by an English statute, a joint company is a partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the copartners. *Abbott vs. Rogers*, 16 C. B. 277, 292, 81 E. C. L. 278.”

“A joint stock company is controlled by a board of directors, or governors like a corporation, and individual members cannot, as such, make contracts on its behalf. *Topeka Bank vs. Eaton*, 107 Fed. 1003.”

“Under the Pennsylvania statutes such companies are quasi-corporations *de facto* partaking of the nature of limited partnerships. *Briar Hill Coal, etc., vs. Atlas Works*, 146 Pa. St. 290, 23 Atl. 326.”

As a matter of fact, the similarity between a corporation and a joint stock company is so great that in at least one instance “it has been held that a foreign joint stock company which possesses all of the attributes and powers of a corporation may be taxed for doing business in a state other than that where it was organized, under a law imposing a tax on foreign corporations doing business within the state.”

23 Cyc. p. 469 and cases cited.

On page 11 of the brief of plaintiff in error reference is made to the case of “*Elliott vs. Freeman*, 220 U. S. 178 and *Roberts vs. Anderson*, 226 Fed.

7, in which similar language in the excise tax law of 1909 was under construction and in which organization of the 'joint stock company or association' class were referred to interchangeably as 'unincorporated joint stock companies or associations, joint stock companies, joint stock associations' ", etc.

At the time that the opinions were rendered in the two cases cited *supra*, the Federal income tax law of 1909, and under which said opinions were rendered, applied to "every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares organized under the laws of the United States, or of any state or territory", but, on account of the interpretation in the two cases just referred to material changes appeared in the wording of the federal income tax law of 1913. The significance of this change in the wording of the tax law can best be shown by quoting what Black, the author of *Black on Income Taxes*, said just after reviewing said cases cited and referred to herein. Section 268, page 382 of his text is as follows:

"But it is important to notice that the Act of 1913 is made applicable to 'every corporation, joint stock company or association organized in the United States, no matter how created or organized.' In view of the decision above referred to, this change of language must be considered highly significant, and manifests an intention on the part of Congress to

apply the tax to all kinds of joint stock companies or associations, whether organized in accordance with the law of any given state or merely with such powers and characteristics as they may possess at common law. And the Treasury Department has ruled that: 'It is immaterial how such corporations are created or organized. The terms 'joint-stock companies' or 'associations' shall include associates, real estate trusts, or by whatever name known, which carry on or do business in an organized capacity, whether organized under and pursuant to State laws, trust agreements, declarations of trusts, or otherwise, the net income of which, if any, is distributed, or distributable, among the members or share owners on the basis of the capital stock which each holds, or where there is no capital stock, on the basis of the proportionate share of capital which each has invested in the business or property of the organization, all of which joint-stock companies or associations shall, in their organized capacity, be subject to the tax imposed by this act.'

In conclusion, the Government suggests that from the foregoing it appears that the only cases of partnership that are not included in the federal income tax law in question are those of the common law and simple type and not those with a limited liability and possessing practically every characteristic of a corporation, with the possible exception of being a legal entity and clothed with a charter. This leads to the further conclusion that the action of

the District Court of the Territory of Hawaii
should be sustained.

Respectfully submitted,

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